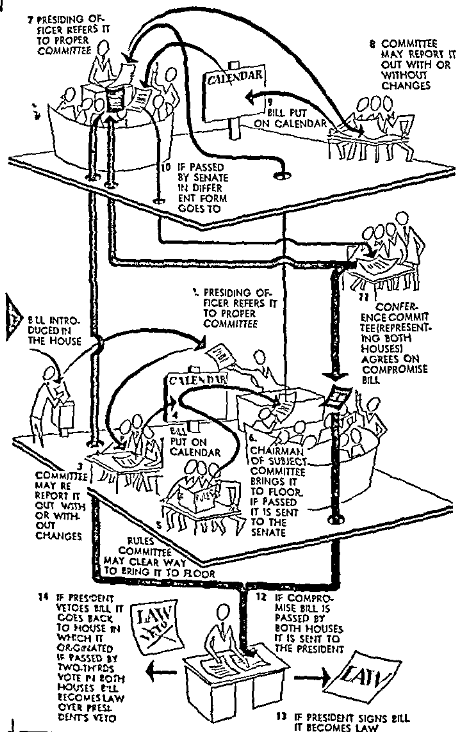
# THE PATH OF A BILL THROUGH CONGRESS



# ESSENTIALS OF AMERICAN GOVERNMENT

BY

FREDERIC A OGG

AND

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SEVENTH EDITION



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# PREFACE

This new edition of *Essentials of American Government*, like the preceding six editions, has been designed to meet the need for a survey of government in the United States somewhat briefer than the authors' *Introduction to American Government* Dr Ogg completed his work on the manuscript of this latest revision and delivered it to his publisher just before his death in October, 1951

Although extensively rewritten, no fundamental change has been made in the approach and pattern gradually developed through preceding editions The authors have always had the conviction based on wide experience that, after certain broad foundations have been firmly laid, underclassmen in our colleges can most effectively study the organization, functions, and processes by concentrating on one of our three major levels of government at a time

Frequent revisions of the Ogg and Ray texts have made it possible to keep them as nearly abreast of the times as the rapid changes in events have permitted The present volume is no exception, in that it covers developments substantially through 1951, and occasionally somewhat later For example, the announced results of the 1950 Census have been incorporated throughout, including the reapportionment of seats in the House of Representatives The new visual aids have been especially prepared to give graphic emphasis to certain important facts and principles These were executed under the direct supervision of Dr Ogg

Special acknowledgment should be made to Professor William H Young of the University of Wisconsin who undertook the task of proofreading and indexing carried by Dr Ogg in the past

THE PUBLISHER

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# PART I

# Elements of Constitutional Government in the United States

## CHAPTER 1

# A New Nation and Its "Supreme Law"

The scope o govern ment in the United States

Ancient Greece, medieval England, and modern Switzerland show that there is no necessary connection between a country's size and the significance of its political ideas and institutions The rich and varied political rôle of the United States, however, has been played on a broad stage Our national government operates over a home territory of more than 3 million square miles, besides outlying dependencies totaling another half-million—an expanse, in all, exceeded only by that of the U S S R , and the number of people under its jurisdiction (some 150 7 million in 1950) surpasses that under any foreign government except only in the U S S R , China, and India More than 2 million officers and employees are required for carrying on its civilian activities, and anywhere from $40 billion to $70 billion are spent on or by it in a single year Within its wide orbit furthermore, are 48 different states, a dozen or more organized or unorganized territories, 3,050 counties, some 19,000 towns and townships, about 16 000 municipalities, an estimated 90 000 school districts, and 8,300 special districts of other descriptions—all performing governmental functions ranging from the full-orbed activities of nation and of states to the single purpose services of school and other districts, and all fitting in their various ways into the scene confronting any observer of American government and politics

The intent of the present book requires the national government to be treated at greatest length, the many state governments to be reduced for briefer survey to a single general pattern with variations, and multitudes of county, town, township, municipal, and district governments to be touched upon only in terms of the more typical features which each form of unit presents The actual volume and variety of the country's day by day experience with constitutional interpretation, legislation, administration, judicial activities, taxing and spending, electoral procedures, and intergovernmental relations can be grasped, however, only if one visualizes literally thousands of governments, large and small, general or special, in action every day of the year in every corner of the land

In another dimension, too—time as well as space and numbers—organized government in this country has impressiveness, for it reaches far into the past The national government is in the third quarter of its second century Several of the state governments—resting back upon colonial governments established

Deep historical roots of our political institutions

two or three hundred years ago—are even older The county dates from 1634 in Virginia and 1643 in Massachusetts, in its characteristic New England form, the town started practically with the landing of the Pilgrims at Plymouth in 1620, and New York became the first chartered municipality (under Dutch rule) as long ago as 1653 Not only so, but many political ideas and institutions now current have an even remoter European background County, borough, parish, sheriff coroner, justice of the peace, popular election and representative legislature, limited executive and the common law, jury trial, *habeas corpus* equality under the law, the right of petition, of assembly, and of self taxation—all were carried to our shores from across seas, being rooted in the England of the Bill of Rights, of *Magna Carta* and even of Norman-Angevin administration All form parts of a common heritage which English-speaking peoples everywhere today are bent upon defending against subversive forces abroad in the world

## OUR FIRST STATE AND NATIONAL GOVERNMENTS

Revolutionary state constitutions and ...ents

When, during the seventeenth and eighteenth centuries, English colonies were founded on the Atlantic seaboard under charters granted to trading companies, individual proprietors, or colonists directly, some framework of government always was provided, and thus the first governments to arise on American soil were those of dependent colonial establishments From these—with their governor, council, elective assembly, courts, and local units and authorities—it was no long step, when the Revolution began, to governments of independent states further developing a pattern now to be found from Maine to California Even before independence was declared, the Continental Congress admonished erstwhile colonies in which rebellion and war had thrown affairs into disorder to take matters into their own hands and put their political houses in order, and while Connecticut and Rhode Island found it necessary for this purpose merely to revise their exceptionally liberal charters, all of the others gave government within their borders a new basis and sanction by in one way or another framing and adopting a special fundamental law, or constitution, Massachusetts closing the list in 1780

Glancing over this first set of state constitutions—conspicuous for their brevity as compared with most state constitutions of later days—one observes four or five major features (1) On the one hand, they had a definitely liberal slant in that the people were declared the sole source of authority, with a "bill of rights" included in seven instances and in any case the principle of civil liberty clearly asserted (2) On the other hand, they stopped short of providing for broad political democracy The right to vote was commonly restricted to property holders, with usually high property qualifications (sometimes also religious tests) required for election to the legislature and for office holding generally (3) Reflecting a prevalent fear of government growing too strong, powers were conferred sparingly (4) For better protection of the people's liberties, powers were divided more sharply than in colonial times among three distinct and coördinate branches of government (a) executive, headed

by a governor, stripped, however, of most powers, like the veto, which had proved troublesome in colonial days, (b) legislative, consisting of a legislature of one house in Pennsylvania and Georgia but elsewhere of two, with only the lower popularly elective, and (c) judicial, embracing usually three grades of courts, starting with the justice of the peace, and in all instances carried over from the colonies with less change than in the other two branches (5) For purposes of local government, the town continued to dominate in New England and the county in the South, with mixed town county systems prevailing in Middle states like New York, New Jersey, and Pennsylvania

*The Articles of Confederation*

Strung along a seaboard nearly 1,300 miles in length and handicapped by eighteenth century conditions of communication and transportation, the colonies long made scant headway toward community of action, and little encouragement to that end was received from the mother country Circumstances after 1770, however, made cooperation imperative And gradually the emerging states attained a measure of union, first under a Continental Congress resting on no formal constitutional basis and enjoying no powers except such as separate and jealous states permitted it to exercise, but eventually under our first written national constitution, the Articles of Confederation Drawn up by a committee of the Congress almost simultaneously with adoption of the Declaration of Independence, the Articles, however, were not approved by that body for over a year, held back, too, by the necessity of obtaining ratification by all of the states, they finally went into operation only in 1781, when the war inspiring them was approaching an end

*1 Principal features*

Under the Articles,[1] the United States at least achieved a government with powers and functions constitutionally defined—a government, it must not be forgotten, considerably superior to the extralegal Continental Congress, even though it, in turn, proved inadequate and eventually had to be replaced Three main features characterized it The first was continued sovereignty of the states, expressly asserted in the document s second 'article" For "the more convenient management of the general interests of the United States," the states, it is true, relinquished important powers to the new central establishment But, all told, these were insufficient for a strong national government, the union remained only a loose confederation, or league, and, notwithstanding that the Articles spoke of it three times as "perpetual," the states plainly regarded themselves as entitled to withdraw if and when they chose

*(a) Continued sovereignty of the states*

*(b) The Congress*

A second feature was the concentration of all national powers, such as they were, in a Congress of one house, meeting annually, and composed of delegates appointed in each state for a single year as the legislature might direct Each state paid and instructed its own delegates, and could replace them with others at any time, and no person might serve more than three years out of any six A state might send any number of delegates from two to seven But voting was by states, and each state had one vote Committees might be set up and subordinate officers appointed Executive and legislative functions,

[1] The text of the Articles may be found in many places *e g*, J M Mathews and C A Berdahl *Documents and Readings in American Government* (rev ed ) 27 34

however, were merged in a single body, the former exercised chiefly through a "committee of the states" consisting of one member of Congress from each state, and, aside from a court of appeals for admiralty and wartime cases, there was no national judiciary

(c) Powers and limitations

Not only was organization thus simple, but, in the third place, powers and functions were few and in most instances severely restricted Far from being a general lawmaking authority like our present Congress, the Congress of the Confederation was, in effect, only a grand committee of the states charged with managerial functions such as looking after foreign relations, declaring and conducting war, building and equipping a navy, carrying on dealings with the Indian tribes, borrowing money, issuing bills of credit, and making requisitions upon the states for soldiers and for funds In other words, while endowed with power to regulate weights and measures and a few other things, the body was essentially an executive rather than a legislature In any case, it could not reach down past the state governments to control the people in any direct way It could adopt resolutions and issue commands But it had no effective means of enforcing them—none at all through judicial process except by resort to the courts of the states And some of the vital powers intrusted to it, *e g* making treaties and coining and borrowing money, could be exercised only if the delegations of as many as nine states concurred

Even under these limitations, the new national government achieved a good deal It carried the Revolutionary war to a successful conclusion, won favorable terms of peace preserved the idea of union, set up our first national executive departments, and in the Northwest Ordinance of 1787 enacted the most significant law in our history on the management of dependent territories, a law which influenced the development of the entire Western territory

Four inherent defects, however, quickly produced distressing results (1) The first was a total lack of power to raise money by taxation Financially, the new régime was supposed to be supported by funds furnished by the states in response to requisitions voted by Congress In practice, however, such contributions proved a hazardous resource Congress could apportion sums and ask remittances, but it had no way of compelling a state to turn over a penny, and while two or three states—chiefly New York and Pennsylvania—made honest effort to comply with requests, the remainder responded only irregularly or not at all Borrowing helped a little, but accumulated debt already was heavy and the country's credit worn thin (2) Almost equally serious was complete lack of power to regulate commerce among the several states One has only to consider what such lack of power would mean today to get some idea of the commercial chaos prevailing under the Articles Serving only their own interests, states freely levied tariff duties against one another, placed discriminative restrictions on navigation, granted privileges and set up barriers, with no power anywhere to devise and enforce a uniform commercial policy Trade languished and prosperity suffered (3) Resting exclusively upon states, and not upon people, the central government not only could not tax, but in other matters could merely adopt resolutions, advise and admonish, and trust that state authorities having power to act would give heed Even

when—as during the Shays uprising in Massachusetts in the discouraging winter of 1786 87—the new order was gravely imperiled, there was no way to raise troops except through state action (4) State delinquencies were not confined to ignoring requisitions for money and for armed forces Treaties negotiated by Congress were violated, independent pacts were unlawfully concluded with Indian tribes, interstate alliances were entered into without the required consent of Congress, and other infractions of the Articles were committed, with Congress powerless to prevent or punish them

The movement for revision

Even before the Articles took effect, men who had the country's welfare at heart—among others of prominence, Washington, Hamilton, Madison, and Jay—doubted whether a government so devoid of power could succeed, and a few years of experience brought matters to a point where either the experiment must be given up and the states allowed to slip back into full independence, or heroic effort must be made to create a true nation with a real government There were people, especially in the remoter interior, who would have been entirely willing to see the idea of union abandoned Matters had gone too far, however, and the perils of disunion were too manifest, to permit of such a defeatist solution, and, with scattered attempts to patch up the Articles by modest amendments persistently failing, thought gradually turned to the possibility of general revision through a special representative convention In 1786, with Congress frankly telling the people of the almost disunited states" that the government was at the end of its tether, a convention at Annapolis, called only for devising remedies for the commercial situation, proved abortive because delegates from only five states presented themselves Before disbanding, however, those present unanimously adopted a report prepared by Madison proposing a convention of all of the states at Philadelphia in the following May, and in due time Congress, now manifestly grasping at straws, made the call official The purpose, moreover, no longer was mere agreement on commercial matters, but all round revision to "render the federal constitution [the Articles] adequate to the exigencies of the government and the preservation of the Union" Little was said about drawing up an entirely new frame of government, and instructions given the delegates, when chosen, plainly assumed that nothing would be done beyond revising the existing one But all of the states except Rhode Island eventually named delegates, and, new constitution or not, most thoughtful persons must have believed with Madison that unless "some very strong props" were applied, the existing union would "quickly tumble to the ground," and with Hamilton that "a nation without a national government is an awful spectacle"

## THE CONSTITUTIONAL CONVENTION OF 1787

Membership

The convention was announced to meet on the second Monday of May, 1787 When that day arrived, however, only a few delegates had reached Philadelphia, and since it was useless to start until a majority of the states were represented, the opening session did not take place until May 25 Although characterized by Jefferson as 'an assembly of demigods," the conven-

tion naturally contained men of widely differing temperaments, abilities, and aptitudes There were members of great personal force and political sagacity, notably Washington and Madison of Virginia, Franklin and Wilson of Pennsylvania, Hamilton of New York, and Dickinson of Delaware [2] There were delegates of genuine but not exceptional ability, such as Rufus King of Massachusetts, Roger Sherman and Oliver Ellsworth of Connecticut, Gouverneur Morris of Pennsylvania William Paterson of New Jersey, George Mason and Edmund Randolph of Virginia, John Rutledge and Charles Pinckney of South Carolina And there were members (fortunately not many) of narrow vision and limited talent, except as politicians, *e g* Lansing and Yates of New York, Elbridge Gerry of Massachusetts, and Luther Martin of Maryland Lawyers predominated, and several of the delegates were reasonably well acquainted not only with the history of English law and politics, but with the governmental systems of Continental Europe About half were college graduates Practically all had been active in the government and politics of their respective states Many had helped frame constitutions, sat as members of legislatures, or held executive or judicial offices Thirty-one had served in Congress Men of age and maturity were included, notably Franklin, who was almost 82 But a large proportion of the most active and influential delegates were remarkably young for such business Madison the master-builder, was 36, Gouverneur Morris 35, Hamilton 30, Charles Pinckney 29 The average age was 42

Conservative temper

Furthermore, the men who now held the country's political destinies in their hands were not, in the main, the same as those who had led in resisting British authority and fomenting independence In general, they were a more conservative and cautious group Patrick Henry "smelt a rat," and refused to attend. John Hancock was not there, nor were Richard Henry Lee, Samuel Adams, and Thomas Paine Almost to a man, the delegates were drawn from the professional and propertied classes, chiefly in the tidewater areas where such wealth as existed was largely concentrated Forty of the 55 who actually attended owned public bonds or other securities, 14 or more had acquired land for speculative purposes, 24 were loaning money at interest, 11 had mercantile, manufacturing, or shipping connections, at least 15 were slave-owners Not one was a frontiersman or a wage-earner, and only one had a small farmer background Few were as conservative as Hamilton, who wanted to see a highly centralized and frankly aristocratic political system set up But few, also, could be classed as democrats, in the sense of springing from and representing the small-propertied or propertyless elements of the population [3]

Common objective

Once the delegates started their discussions, plenty of disagreements were bound to arise Upon the objective chiefly to be aimed at, however, there was,

[2] Jefferson and John Adams were on diplomatic missions in Europe otherwise they undoubtedly would have been members

[3] The members of the convention are characterized briefly, one by one in M Farrand *The F ming of the Constitution* (New Haven 1913) Chap ii and the connections between their interests a eir political ideas and aims is discussed illuminatingly although pos some ov s in C A Beard *An Economic Interpretation of the Constitution ued Stat* , New York, 1935) 74-149 189-216

first and last, little difference of opinion—namely, a government of sufficient strength not only to take care of national defense and to discharge national obligations, but to withstand agrarian debtor agitation, protect property, preserve social order, and keep the country on an even keel And although the resulting constitution provided for a more popular plan of government than could at that time have been found in any other important country in the world, it is not surprising that, motivated as it was, it should have been purposely shaped—with the aid of checks and balances, indirect elections, suffrage limitations in the states presidential veto, and potential judicial review—to prevent restless and irresponsible elements from capturing control of affairs Initially, it contemplated government by people of economic substance But it did not close the doors against more democracy later on, and therein lay one of its principal merits

Organization and procedure

The convention's sessions were held in the old brick State House in Philadelphia, probably in a room directly above that in which the Declaration of Independence was signed Seventy four delegates, in all, were chosen[4] but only 55 ever attended, of these, some were present only part of the time, and the average attendance seems not to have exceeded 30 or 35 At the opening meeting Washington was unanimously *chosen to preside, and this prevented* him from participating in debate Indeed, so far as is known, he addressed the convention only twice on the opening and closing days With the possible exception of Franklin he however was less dependent on oratory than any other delegate He performed his duties as moderator in a manner to allay strife, in private conversation and informal conference, his opinions and advice were always to be had, and it is doubtful whether, on the whole, any member exerted greater influence

Having full power to make its own rules, the convention early decided, not only that each state, regardless of number of delegates, should have one vote, as in the contemporary Congress, but that, in order to enable members to speak freely and plainly and to protect them against outside criticism and pressure, the sittings should be behind closed doors, and that nothing should be put into print or otherwise made public until the work was finished, and this injunction of secrecy was observed with remarkable fidelity A secretary was appointed, and a journal kept When, however in 1819 this official record was printed by order of Congress in the hope that it would throw light on the way in which

be interpreted

formal motion

efficient delegates, sensing the importance of what was being done, planned to keep a record of his own This was Madison Fragmentary memoranda were left by a few other members, and something can be learned from letters written by certain delegates to their friends But what we know today about the convention's discussions as distinguished from its formal actions, comes mainly from the clear and candid *Notes* laboriously compiled—sometimes to

[4] From 12 states Rhode Island declined to take any part

the extent of 3,000 or 4,000 words a day—by the able and methodical Virginian [5]

## THE CONSTITUTION FRAMED

*The convention's main problem*

Deliberations had not gone far before the delegates were brought face to face with a challenging question Should they merely revise the Articles of Confederation, or should they make a new constitution? There was no getting around the fact that their instructions looked only to revision, or the strong probability that the proposal for a convention never would have prevailed if the people of the states had supposed that anything more drastic was going to be undertaken On the other hand, many thoughtful persons agreed with Washington when he expressed hope that the convention would "adopt no temporizing expedients," but would "probe the defects of the constitution [i e the Articles] to the bottom and provide a radical cure, whether they are agreed to or not" Both points of view were well represented in the convention, and a plan based on each was quickly presented for consideration

*The Virginia plan*

The first scheme to appear came logically from the state that had taken the initiative in bringing the convention about, i e, Virginia Governor Edmund Randolph presented it, although Madison was its principal author, and it embodied the best thought of the convention's ablest student of political, and especially federal, institutions The plan did not explicitly repudiate the Articles But it looked to a drastic reconstruction of the system of government existing under them and the fiction that a mere revision was intended was soon dropped A national executive was to be established, also a national judiciary, and, finally, a legislature, with a lower house elected directly by the people and an upper one chosen by the lower from persons nominated by the state legislatures The new government, moreover, was to have greatly increased powers, among them those of levying taxes, vetoing state legislation when considered contrary to the national constitution or to a treaty, and calling forth the militia against any member of the union 'failing to fulfill its duty" Presented on May 29, in the form of 15 resolutions, this plan gave the convention something to go to work on immediately, and for two weeks the delegates, sitting in committee of the whole, discussed it zealously

*The New Jersey plan*

One feature of the plan strongly objected to by members particularly sensitive about the "rights" of their states was the proposal to substitute for the existing equal voting power of the states in Congress an arrangement under which, in both branches, such power should be apportioned in accordance with numbers of free inhabitants, or perhaps contributions to the national treasury, and to forestall such an innovation, a group of small state delegates decided to present a counter plan based on a 'purely federal' principle Cast in the form of nine resolutions, and laid before the convention on July 15 by William Paterson of New Jersey, the resulting project also contemplated significant changes Congress was to have power to raise money from duties

on imports and from stamp taxes and to regulate commerce, and measures enacted were to be "supreme law of the respective states" A national executive, too, was envisaged, in the form of a council chosen by Congress, and a national judiciary composed of a "supreme tribunal" Congress, however, still was to consist of but a single house, with all states retaining an equal voice

Compromise the only solution

Advocated ably by Paterson and other interested members, the New Jersey plan enlisted the support of the delegates of about half of the states Introduction of it, indeed, split the convention sharply into two factions or groups, one representing the large states and the other the small ones One wanted political power proportioned to the ability of the states to aid in bearing the public burdens, the other wanted the states to retain the full equality they had enjoyed since independence, and argued that on any other basis the less populous ones would be placed at grave, and even ruinous, disadvantage Happily, it was not necessary that either element have its way completely The delegates were, after all, practical minded patriots, accustomed in their business relations and in their state politics to the saving principle of give and take They expressed their widely differing views freely, sometimes acrimoniously But, having done so, most of them were not averse to compromise, and the constitution upon which they finally agreed became, clause after clause, a product of mutual concession

Decision in favor of a strong national government

Fortunately, however, a majority of the delegates were essentially united on matters of decidedly larger significance than those on which they differed, and compromise was invoked only after certain vital decisions were reached Most important among these was to cast aside the Articles and fashion a national government of greater inherent strength than they ever could be made to yield Some delegates were of the opinion that the instructions given by the states were binding literally, and that if the convention wanted to do more than merely revise the Articles, its members should go back to their states and ask for appropriate authority But the majority were, as Randolph later put it, "not scrupulous on the point of power," and felt, as he further testified, that "when the salvation of the republic was at stake it would be treason to our trust not to propose what we found necessary" Within five days after the convention began work, a resolution was adopted in committee of the whole "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary", and Madison, Hamilton, and other delegates made it perfectly clear that this meant a government embodying one supreme power, with "complete and compulsive operation" The small state elements protested, saying at first that they would have no part in such a union, the large state delegates declared they would accept nothing less The small state people brought forward the New Jersey plan, yet at the final test only three states voted for it From first to last—sometimes at grave risk of driving the convention on the rocks—the initial determination was wisely adhered to The time for compromise had not yet come

From the key decision mentioned flowed, also, certain great corollaries (1) the powers of the national government should be sharply increased, (: the machinery of government should be expanded as indeed was proposed

all of the plans offered, (3) the national government, equally with the state governments, should operate directly on the people, through its own laws, administrative officers, and courts, and (4) the new constitution should be "the supreme law of the land," enforceable in the courts like any other law, and paramount over all other constitutions, laws, and official actions, national or state

A national govern ment resting upon the people

Adoption of the third principle, in particular, meant that the national govern ment was to be put on a wholly new basis Instead of resting only upon semi-independent states, and enjoying almost no control over the people except through the medium of state authorities, it thenceforth was to be a government of a single body politic, with power to levy and collect taxes and to make and enforce laws by its own direct action Thereafter, as James Wilson explained over each citizen were to be two governments, both "derived from the people," both "meant for the people," and both operating by independent authority upon the people In arriving at such an arrangement, too, the convention as Madison subsequently wrote to Jefferson deftly divested itself of one of its most delicate problems If the experience of the Confederation indicated anything it was that states might fail to live up to their obligations, and every plan thus far offered had assumed it necessary to provide some way of coercing states proving delinquent The nature and method of such coercion would, however, have stirred grave differences of opinion, and members must have been relieved to find that in providing for a national government endowed with power to enforce its authority directly upon *people,* they had—so, at least, it was supposed—made the coercion of *states* unnecessary

The great compro mises

These fundamentals settled, the time had come for compromise, and the first and most notable one related to voting power in Congress The large states wanted representation, and with it voting power, proportioned to population, the small states wanted voting power to be equal, delegates on both sides threatened more than once to withdraw unless their demands were met At a very critical point in the proceedings, the delegates from Connecticut—a middle sized state firmly attached to the idea of a stronger union—brought forward a proposal for equal representation in the upper house, combined with representation in proportion to numbers in the lower house, and after heated debate the deadlock was broken and the compromise adopted This eminently sensible disposition of the matter had been casually suggested quite early and did not originate with the Connecticut delegation Franklin, indeed, probably was its actual author Dr Johnson and his colleagues deserve credit, however, for putting it formally before the convention, with an array of unanswerable arguments, and the agreement has ever since been known as the "Connecticut compromise" It removed the greatest single obstacle to harmony

1 The Con necticut compro *mise*

2 The three fifths clause

The decision in favor of proportioned representation in the lower house, however, made it necessary to determine how population should be com puted, and difficulty at this point was raised by the existence of slavery Should slaves be regarded as persons or as chattels? If the former, they ought to be

counted in, if the latter, they ought to be left out With a view to increasing their quotas in Congress, the Southern states naturally wanted slaves included, the Northern and Middle states, having few slaves, quite as naturally wanted them disregarded, and much lively discussion ensued A possible solution was, however, already in men s minds when the convention met When asking the states for new funds in 1783, Congress had proposed changing the basis of requisitions from land values to numbers of population so computed as to include three-fifths of all slaves This 'federal ratio" was early incorporated in the Virginia plan as an amendment, it found a place also in the New Jersey scheme, and, notwithstanding initial differences of opinion, it was ultimately adopted as being, in the words of Rufus King, 'the language of all America " There was no defense for it in logic But it represented the closest approach to a *generally satisfactory formula that a body of practical minded men could* discover The slave states received less representation than they thought their due Compensation, however, was found in a provision that direct taxes laid by Congress should be apportioned on the same reduced basis as representation—although, in point of fact, direct taxes were actually imposed by the national government only four times before slavery was abolished

3 Commerce and the slave *trade*

Still another compromise had to do with the powers of Congress over commerce The states north of the Potomac had large commercial interests and, having suffered most from the commercial anarchy of the Confederation period, they wanted Congress to have full power to regulate trade and navigation The four states farther south however were agricultural, and their delegates feared that Congress if so endowed would levy export duties on Southern products and in other ways discriminate against the non commercial section Furthermore, there was *the question of the foreign slave trade* The Northern states would have been willing to see the traffic abolished immediately, and Maryland and Virgina, being well stocked had no great interest in it But Georgia and the Carolinas wanted it to continue, and the convention was told firmly that these states never would accept the new constitution "unless their right to import slaves be untouched ' The outcome was an agreement reasonably acceptable to all elements Congress was to have broad powers to regulate navigation and foreign trade including power to lay duties on imports But duties on exports were forbidden, and the importation of slaves was not to be interfered with by the national government (except to the extent of a head tax not exceeding $10) prior to the year 1808

*The constitution completed*

Many other important matters claimed the attention of the delegates through the sultry mid summer days during which the convention patiently pursued its labors *The nature and powers and especially the mode of selection*, of the executive absorbed much time the more by reason of the fact that plans gradually took form for a chief executive different from any that the world had ever known The manner of electing senators—whether by the people, by the state legislatures, or by some agency improvised for the purpose —proved difficult to decide The appointment and status of the national judiciary provoked ardent discussion The broadened powers to be vested in Congress, the mode of admitting new states, the control of the national gov

ernment over state militia, the manner of amending the new constitution—these and a score of other topics required painstaking consideration, including further compromises, and the convention, as Franklin testified, spent a great deal of time "sawing boards to make them fit " From first to last, the Virginia plan as progressively revised formed the main basis of discussion First, the essentials of this plan, as embodied in the Randolph resolutions, were threshed out in committee of the whole Then, after being reported back to the convention considerably altered, they were again debated in full Next, the growing document was turned over, near the close of July, to a committee of detail, which worked it into a balanced constitutional text, and the convention spent upwards of six weeks more discussing this draft Finally, Gouverneur Morris, aided by his fellow-Pennsylvanian, James Wilson, wrote out with his own hand the completed fundamental law, putting it into the lucid English for which it ever since has been notable among great documents, and at the middle of September, 39 delegates, representing 12 states, signed it

*The test ahead*

*To a group of delegates, Franklin remarked while the signatures were being* affixed that 'often and often" during the session he had looked at a sun painted on the president's chair without being able to tell whether it was rising or setting "Now, at length," he added hopefully, "I have the happiness to know that it is a rising and not a setting, sun " The actual test, however, was yet to come The convention had ignored instructions given most of its members, and, instead of patching up the Articles, had fashioned a new and very different instrument Would the people of the states approve? Even the delegates were not too well pleased, a few, in fact had left early in disgust When the document was signed, three refused to put their names to it, and of 13 absentees, half were known to be critical if not actually hostile Franklin, although optimistic, had misgivings, Hamilton admitted that he signed mainly because of believing that the proposed government could not possibly prove worse than the existing one

## THE CONTEST OVER RATIFICATION

Procedures

A decade earlier, adoption of the Articles had been held up for three and one half years by necessity of awaiting ratification by every one of the states To ease matters this time, the constitution provided that it should take effect when ratified by nine states only, and to give it a popular basis otherwise lacking, action was to be taken in each state, not by the legislature, as in the case of the Articles, but by a convention chosen for the purpose by the voters Assenting to both specifications, Congress transmitted the proposed instrument to the states without recommendation or other comment

Popular doubts and objections

With the states turning to election of their conventions and the resulting bodies attacking their task, controversies that had waxed hot at Philadelphia were transferred to the country at large, and from New England to Georgia, the new frame of government was circulated and discussed, dissected, explained, praised, denounced, with scarcely a feature escaping attack Men like Patrick Henry and Samuel Adams, passionately devoted to the Revolutionary

concepts of liberty, took instant offense at the contemplated centralization of authority Others, on the contrary, thought centralization not carried far enough Paper-money elements were aroused by the clause which forbade the states to issue bills of credit Many Northerners considered that too much had been conceded to the slave holding interests, many Southerners thought these interests had been dealt with unfairly Large inland elements—small farmers, backwoodsmen, pioneers—feared the effects of the commercial powers given to Congress, men of property, although generally favorable, wondered how freely the new taxing powers would be used Everywhere the complaint was voiced and rightly, that the document, although touching upon *habeas corpus* jury trial, and bills of attainder, failed to take notice of numerous fundamental rights and liberties, *e g* freedom of speech, freedom of the press, freedom of assembly, right of petition, and religious liberty, so carefully guaranteed in the bills of rights prefixed to a majority of the state constitutions No single group of dissenters could have prevailed by its own efforts, but in most states the various "Anti Federalist" elements tended to merge into an opposition extremely difficult to convert or overcome

Ratification by nine states

In the Philadelphia convention the interests hardest to satisfy were the small states Conclusions arrived at, however, proved generally favorable to those states, which accordingly became the first to ratify Delaware "came under the federal roof" on December 7, 1787, New Jersey, on December 18, Georgia, on January 2, 1788, and Connecticut one week later Although a large state, Pennsylvania was centrally located and federally inclined, and its convention ratified early *i e* on December 12 This rapid pace, however, could not be maintained In Massachusetts Virginia, New York, and other states, time was required to rally support, and while, after ratification started, there never was much doubt that as many as nine states would finally act favorably, there was grave danger lest some state indispensable because of its location or general importance should remain obdurate By cleverly appeasing Samuel Adams and John Hancock, to whom the Anti Federalists of the interior looked for leadership, the supporters of the plan won in Massachusetts, February 7, 1788, although by an extremely close vote, and only after agreeing to a series of suggested amendments aimed at reducing the power of the central government Between April and June, Maryland, South Carolina, and New Hampshire followed each after a hard contest, and this brought up the number to the required nine No one, however, supposed that the new government could be launched successfully on this minimum basis Even after Virginia, on June 25, and after a bitter fight, gave a favorable decision, the battle was but half won, New York was still outside, and New York was a pivotal state without which the union would be a mere caricature

Ratification in New York—*The Federalist*

Moreover, the opposition in New York, especially in the rural sections, was formidable, and realizing this, the friends of the constitution made every effort before the state convention met at Poughkeepsie to convince the people that the proposed plan was moderate, safe, and workable Most active was Hamilton, who, after having been "praised by everybody but supported by none" at Philadelphia, now came into his own as a leader in the campaign

for ratification He it was who conceived the idea of printing in the leading newspapers of the state a systematic explanation and defense of the constitution in the form of a series of brief public letters, associating with himself for the purpose another able New Yorker, John Jay, and also the most convincing expounder outside of New York, namely, Madison The result was the remarkable group of papers, 85 in number, appearing over the pen name "Publius,' but ever since known to students of American history as *The Federalist* The letters were prepared in haste and published, at the rate of three or four a week as campaign documents [6] But their authors—all young and vigorous—were full of their subject and knew how to write, and, taken as a group the papers, though frankly propagandist and presenting only one side, never have been surpassed as examples of direct, lucid, and convincing exposition Completed by six papers first appearing in book form, and constituting one of the world s few really great treatises on government, the collection has passed through more than 30 editions Better than anything else—unless possibly Madison's *Notes*—it shows what the constitution meant to the men who made it

The constitution put into effect

Whether because won over by Hamilton and his collaborators or because of being unwilling to see the state remain outside of the new union after all but two of the others had agreed to join, the New York convention finally ratified on July 26 (1788), although by a margin of only two votes Meanwhile, it was officially announced in Congress that the ninth state had ratified, and attention was turned to preparations for putting the new government into operation The states were called upon to choose presidential electors, senators, and congressmen, and New York City was selected as the temporary seat of government [7] Then the old Congress, already reduced to inaction by lack of a quorum disappeared, leaving the field clear for its successor The new House of Representatives was organized on April 2, 1789, the Senate came together three days later, and on April 30, Washington took the oath of office as president Seven months afterwards, North Carolina appeased by a decision of Congress to submit a series of constitutional amendments guaranteeing civil liberties, and threatened with being treated commercially as though a foreign country, ratified the new instrument, and similar action by Rhode Island in the spring of 1790 made the union complete

A remarkable record of survival

The "supreme law which the founding fathers thus arduously devised and hopefully adopted has served as a charter of free government in this country for over a century and a half [8] Within this time, it has seen 13 states increase to 48, less than 4 million people become more than 150 7 million, a simple, largely frontier, economy transformed into the bewilderingly complex national life of the present day Nowhere else is there a written constitution with so imposing a record To be sure, the document has been refurbished by the

[6] Hamilton alone wrote upwards of 60 of them Madison contributed 15 or 20 and Jay

incorporation of 22 different amendments Many, if not most, of its terse but expressive clauses, too, have proved merely starting points for interpretation, usage, legislation, administrative action, and judicial decision feeding ever-widening streams of new constitutional law and practice Without such open avenues for revision and adaptation, it, indeed, never would have survived Despite all, however, the constitution as it came from the hands of the framers still lives, and the general scheme of government for which it provided remains intact

## THE CONSTITUTION'S CHARACTERISTICS AND SOURCES

The constitution as a document

"This paper," wrote Robert Morris in commending the constitution to a friend, "has been the subject of infinite investigation, disputation, and declamation While some have boasted it as a work from Heaven, others have given it a less righteous origin I have many reasons to believe that it is the work of plain honest men and such I think, it will appear" Herein lies the reason why the instrument, once adopted, succeeded and survived beyond the hopes of its most ardent sponsors First as constitutions go, it is a brief and simple document Even with the amendments, its approximately 6,000 words fill only 12 or 15 pages of print, and one can read it through in leisurely fashion in half an hour Second, its contents are organized according to a clear and logical pattern Following a brief preamble (significant as a statement of objectives, but having no legal force), three main articles are devoted to the legislative, executive, and judicial branches, respectively Four shorter articles deal, in order, with the position of the states, the modes of amendment, the supremacy of national power and ratification Finally come the amendments, appended at the end and numbered serially Third, thanks to the committee of detail, and especially to Gouverneur Morris, the document's language is clear, direct, and concise, there is not an unnecessary word or an intentionally ambiguous phrase A few clauses of the original instrument, it is true, *e g*, those relating to citizenship eventually lent themselves to more than one interpretation So did various specific terms, *e g* "general welfare," "commerce," "freedom of speech," and "due process of law," appearing in the original document or in the early amendments And conflicts arising out of resulting differences of opinion have enlivened our constitutional history for 160 years Speaking broadly, however, our greatest constitutional controversies have been traceable, not to provisions of doubtful meaning, but to provisions not made at all—in other words, to the constitution's *silences*

Significance of its omissions

Yet it is its omissions, at least as truly as its actual provisions, that stamp the document as "the work of plain honest men" If theorists had written it, very likely it would have been filled with high-sounding phrases out of touch with reality Even the plain honest men might have made the mistake of overloading it with details Instead of merely authorizing Congress to regulate interstate commerce, they might have undertaken to define "regulate" and "commerce" Instead of simply empowering Congress to lay and collect taxes to provide for the general welfare, they might have undertaken to specify

the kinds of taxes to be employed, and even to indicate what they meant by "general welfare" If they had done such things, however, they would at once have tied the hands of the new government, and would either have forced a long line of later controversial amendments or permanently thwarted the freedom of interpretation, experiment, and decision which has been the very lifeblood of the nation in later days What the plain honest men wisely undertook was simply to apply practical remedies to the defects of an existing political system In doing this, they were not deterred from strong measures Aware, however, that their judgment and foresight were not infallible, they deliberately omitted from the resulting fundamental law everything that could safely be left to be supplied by generations faced with new problems and blessed with even richer experience

Its sources

It follows that the framers—even though coming off with a constitutional system in many respects unique in the world, both then and now—did not go much out of their way to invent political forms Nor did they borrow far afield Some of them were students of Vattel, Montesqieu, and other Continental writers, some had read history and could cite the failures of ancient confederacies or draw illustrations from the experiences of France and other Continental states But, as some one has remarked, this knowledge taught them rather what to avoid than what to adopt, and in so far as they drew upon European sources at all, those sources were the common law, the principles of *Magna Carta* and the Bill of Rights, the writings of Locke and Blackstone, and other characteristic products of their English motherland In the main, this monumental heritage had passed to America far back in colonial days, and, at the time when the national constitution took form, already was deeply embedded in the constitutions, laws, and usages of the states In a very true and literal sense, therefore, the new instrument grew out of the political life of Americans themselves in the colonial and Revolutionary periods "Experience," said John Dickinson, 'must be our guide, reason may mislead us" Fortunately, our forefathers had accumulated enough political experience by 1787 to serve as a rich and adequate resource

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## CHAPTER 2

# Processes of Constitutional Development

A document with a long life but a brief biography

Our written national constitution has been in operation more than a century and a half—longer than any other in the world [1] Nevertheless, if Madison and Hamilton could return to view it, they would have no difficulty in recognizing it, for although a few passages have been rendered obsolete by expiration or repeal and more than a score of amendments have been added, 73 of the original 84 clauses still stand precisely as they came from the fluent pen of Gouverneur Morris Measured against the crowded annals of the nation's growth, the biography of the constitution as a document, although enlivened by stirring chapters, is brief

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This however, neither tells the story of the country's constitutional experience nor gives any adequate impression of what the constitution in our day actually is For the constitution under which we live is not simply an array of numbered articles and sections and clauses Rather, these are only its framework They remain as basic to it as the foundations and girders of a skyscraper But they are not the entire structure The moment the new fundamental law took effect, executive officers, lawmakers and judges commenced interpreting and applying its provisions, and the resulting decisions and acts forthwith began to amplify and fill out those provisions by adding—not in the document, but in accumulating practice based upon it—an ever expanding wealth of meanings, principles, rules, powers, and procedures As the country developed and the tasks of government grew more complex, expansion continued, reaching perhaps its greatest velocity in the days of the New Deal and World War II And the constitution, or at any rate the constitutional system, of our time embraces not only the documentary provisions from which everything added is supposed to derive validity, but the accretions themselves, becoming therefore a more or less fixed core of articles and sections enveloped and overlaid by a luxuriant growth of interpretations, decisions, and practices—the whole so vast and complicated that scholars undertaking to set forth our national constitutional law even in the relatively concise form of a textbook seldom succeed in covering the subject in less than 1,000 pages In the present chapter, we are concerned with some of the ways in which the constitution

[1] Dating officially from 1780 the constitution of Massachusetts has been amended many times and in 1919 was extensively rearranged

thus expands—first formal amendment, and afterwards legislation, executive and administrative action, judicial interpretation, and usage or custom

## METHODS OF CONSTITUTIONAL AMENDMENT

*The amending clause*

Desiring that the new fundamental law be neither virtually impossible to amend, as the Articles had been, nor yet susceptible of too swift and easy change, the framers devised somewhat difficult, but not impracticable, amending procedures as follows [2]

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress

The only restriction expressly placed upon the free operation of these procedures (aside from a temporary one relating to the slave trade) is that no state may be deprived of its equal 'suffrage," *i e*, voting power, in the Senate without its consent—a restraint pronounced by the Supreme Court in 1856 "permanent and unalterable " [3]

*Stages in the amending process*

*1 Initiation*

Although two methods of initiating amendments and two methods of ratifying them are provided, all amendments thus far adopted have been proposed in the same way, *i e* by joint resolution of the two branches of Congress, and all except the Twenty-first (repealing national prohibition) have likewise been ratified in the same manner, *i e*, by action of the state legislatures Any amendment voted for in both House and Senate by two-thirds of the members present is transmitted by the head (*i e*, the administrator) of the General Services Administration to the governors of the several states,[4] to be laid before the legislatures or conventions The president naturally will have an interest in whatever is proposed and may think well of it or otherwise But he can interpose no veto, indeed, not being legislative acts, amendments are not officially submitted to him at all

*The national convention an unused device*

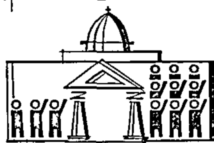
From the circumstance that all amendments thus far submitted have emanated from Congress must not be inferred any lack of attempts to launch them by the alternative method of a national convention In fact, at one time or another the legislatures of considerably more than two-thirds of the states have called upon Congress to convoke a convention for the purpose Sometimes such a request has been made in the interest of some particular amendment like direct popular election of senators or repeal of prohibition Sometimes it has looked rather to getting a convention into existence in order that it might consider what amendments, if any, were needed—petitions with

[2] Art V

[3] [illegible]

this latter objective having been especially numerous at the time of the nullification controversy of 1832 and again in 1859 60 when civil war was imminent

## THE COURSE OF AN AMENDMENT TO THE FEDERAL CONSTITUTION



OR

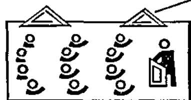


**PROPOSED BY:** Vote of two-thirds of those present (assuming a quorum) in each branch of Congress

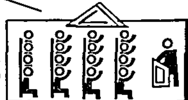
Constitutional convention called by Congress on request of the legislatures of two thirds of the states (32)

**TRANSMITTED BY**
**General Services Administration**

**Governors of the States**



OR
*(as ordained by Congress)*



**RATIFIED BY:** Favorable action by legislatures of three-fourths of the states

Favorable action by conventions in three fourths of the states

**PROCLAIMED BY**
**General Services Administration**

Sometimes the opinion has been advanced that every legislative request for a convention is to be regarded as pending indefinitely, and that whenever two thirds of the states are found to have taken such action (a situation long existing, although not in behalf of any single amendment or amendment program), Congress ought forthwith to call a convention This 'cumulative'

view, however, is not generally accepted Even though there never has been any official determination of the length of time a request from a state shall be regarded as remaining "alive," it is hardly conceivable that Congress would call a convention unless petitions were received from the necessary number of states within a sufficiently limited period to create an appearance of concerted demand, and before that point was reached, Congress itself would quite likely have been influenced to put the desired amendment before the states by its own direct action, as in the instance of prohibition repeal

2 Ratification

Whether a given amendment shall be acted upon within the states by the legislatures or by conventions specially chosen for the purpose is determined entirely by Congress [5] It is more economical to employ the legislatures, and, as observed, this method prevailed uniformly until the Twenty-first Amendment was submitted in 1933 Conventions however, are likely to give quicker results, and they have the further advantage of being chosen by the people with reference solely to the proposal upon which they are to act Although ratified by legislatures, the Eighteenth [prohibition] Amendment came to be looked upon as by nature more appropriate for action by conventions, which therefore were employed in repealing it Whichever plan is utilized reports of actions taken are sent by the governors to the head of the General Services Administration, who, if and when the necessary three fourths majority is attained, proclaims the amendment effective as part of the constitution Until fairly recently, a proposal failing to obtain the requisite majority never was officially announced as rejected, and accordingly was looked upon as remaining before the states indefinitely By their own terms, however, the Eighteenth, Twentieth, Twenty first, and Twenty second Amendments were to become operative only if ratified by the necessary three fourths within seven years How long an amendment fixing no time limit shall be considered pending is, the Supreme Court has said, for Congress alone to decide No decision on the matter ever has been made, and a child labor amendment submitted a quarter of a century ago is by many regarded as still "alive", although some doubt surrounds the matter, and if the requisite ratifications were secured, Congress might have to rule on the point Already, however, Congress has gone so far as to decree that while a state which has rejected an amendment may change its mind and ratify, a state, once having ratified, cannot reverse its action

## THE TWENTY-TWO AMENDMENTS

Number of amendments proposed and adopted

The states were not yet safely gathered under the "new roof," as the constitution was popularly termed in early days, before proposals began to be made for "extensions of the eaves " In all, no fewer than 1,964 drafted amendments were introduced in Congress during the first 100 years of the constitution's history, and 2,056 others found their way to the clerk's tables between

[5] In Hawke v Smith 253 U.S 221 (1920) the Supreme Court ruled that a state may not reach its decision by means of a popular referendum only An "advisory referendum may, however be invoked for guidance of the legislature and when conventions are employed the people in choosing members may virtually predetermine the outcome

1889 and 1941 Nowadays, anywhere from 40 to 60 proposals are presented in the House or Senate (or both) during an average session, referred to the appropriate judiciary committee, filed—and usually forgotten The total number of amendments actually endorsed by the two houses from 1789 is, however, only 27, and the number ratified by the states only 22 Indeed it hardly would be erroneous to say that only 12 actual amendments have been adopted, because the first 10 were, to all intents and purposes, contemporary addenda to the original constitution rather than amendments to a finished document A good deal of trouble would have been saved if their substance had been incorporated at the outset In any case, it is manifest that getting a two-thirds vote in both branches of Congress is the principal hurdle which supporters of any constitutional amendment have to surmount—the chief safeguard against hasty and ill advised changes

The first 10 amendments

As submitted to the states in 1787, the new fundamental law contained no bill of rights and indeed relatively little bearing directly on what we are accustomed to think of as civil liberties The deficiency was promptly noted by the critics and made a leading argument against ratification Hamilton contended that since 11 of the existing state constitutions contained bills of rights or an equivalent, and since in any event the new federal government was to have practically no powers that would enable it to encroach on private rights, no guarantees of the kind were needed But most people thought differently, and of the 124 amendments formally proposed by seven of the states when ratifying, the great majority had to do with this matter Madison was chosen to the first Congress under pledge to use his influence to bring about the adoption of a federal bill of rights, and in June 1789, he introduced a long series of proposals looking to that end Of 17 amendments voted by the House 12 were endorsed by the Senate and 10 were ratified by the states Eight of the number embodied the desired guarantees of personal and property rights the Ninth provided that the enumeration of certain rights in the constitution should not be construed to deny or disparage others retained by the people , and the Tenth laid down the basic principle for determining precisely what powers were reserved to the states or to the people

Eleventh Amendment

The next two amendments were adopted to overcome certain practical difficulties that arose early in the constitution s history In the case of Chisholm v Georgia[6] the Supreme Court held in 1793 that a citizen of one state could sue another state in the federal courts To people of strong states' rights views, this was shocking doctrine and to meet their vigorous protests the Eleventh Amendment was adopted, in 1798 specifying that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state '

Twelfth Amendment

1804, undertook to avert similar difficulties in the future by providing for separate balloting for president and vice president

The first half of the nineteenth century saw many new state constitutions framed and many older ones revised, but apart from the amendment just mentioned no change took place in the national written constitution, notwithstanding that hun-

6 2 Dallas 419 (1793)

dreds of proposals made their appearance in Congress Then however came the

The Civil War amendments

—defined citizenship laid important new restrictions upon the states in the matter of civil rights and undertook to penalize states denying the suffrage to male inhabitants except for participation in rebellion or other crime and the third—the Fifteenth (1870)—forbade both state and federal governments to abridge or deny the right to vote on account of race color or previous condition of servitude

Sixteenth Amendment

*Forty three years now elapsed without further change in the written funda*mental law and people interested in various reforms began to wonder whether amendments would ever again be found possible unless easier amending procedures were introduced—an objective itself attainable only through an amendment A period of great national growth however witnessed momentous changes in politi cal economic and social conditions and attitudes and in the space of 20 years (1913 33) the constitution was amended no fewer than half a dozen times First

$4 000 was construed by the Supreme Court as imposing a direct tax which under *the terms of the constitution must be apportioned among the states according to* their respective numbers —a thing obviously impossible in the case of a tax of this nature After prolonged agitation Congress in 1909 submitted to the states a proposal that the federal government be authorized to lay and collect taxes on incomes from whatever source derived without apportionment among the several states and without regard to any census or enumeration and in 1913 this pro vision—the basis of our present drastic federal taxation of incomes—was added to the constitution as the Sixteenth Amendment

Seventeenth Amendment

The Seventeenth Amendment providing for direct popular election of senators dates also from 1913 This mode of election found few supporters in the Phila delphia convention which decided upon election by state legislatures During the *next 100 years however it grew in favor and while the Senate itself long remained* obdurate the proposal finally prevailed

Eighteenth Amendment

The next two amendments came shortly after World War I and in part owed their adoption to wartime experiences One the unlucky Eighteenth launched a

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*duration and shortly afterwards a constitutional* amendment was submitted to the

the jurisdiction thereof for beverage purposes is prohibited Ratified ultimately by all of the states except Connecticut and Rhode Island the amendment was proclaimed in January 1919

Nineteenth Amendment

The background of the Nineteenth Amendment nationalizing woman suffrage will be reviewed when we later come to the subject of qualifications for voting [7] A resolution submitting the proposal was passed by the House of Representatives early in 1918 The Senate twice refused to concur But a year later agreement was

[7] *See Chap 8 below*

reached, and ratification by the states proceeded with such alacrity that on August 26, 1920, the amendment was ready to be proclaimed Like the Fifteenth, and in very similar language, the Nineteenth Amendment restricts both federal and state control over the suffrage—in the case of the Nineteenth, by forbidding the right of citizens of the United States to vote to be denied or abridged on account of sex.

*Twentieth Amendment*

Until a little over a decade ago, our national political calendar preserved the tempo of a stage coach age A president elected in November did not take office until the following March, a Congress chosen at the same time did not (unless sooner convoked in special session) meet until 13 months had elapsed, and could not in any case start work within less than four months Meanwhile, with a new Congress chosen and endowed with a fresh mandate from the voters, the old one, cluttered up with "lame ducks" who had failed of reelection, sat in more or less perfunctory and futile session from December until the close of its term on March 4 For a decade, Senator George W Norris of Nebraska fought for correction of this glaring defect, and on February 6, 1933, the Department of State was able to proclaim the Twentieth (or "Lame Duck") Amendment, under which the term of a new Congress starts on January 3 following election and a new president is inaugurated on January 20 instead of March 4 Short"—or 'lame duck"—sessions became a thing of the past [8]

*Twenty first Amendment*

The Fourteenth Amendment never has been completely enforced and the Fifteenth has been widely evaded, but the first and only one of the series actually to be repealed is the Eighteenth Although ratified by the legislatures of 46 states, and unshaken by attacks upon it in the courts, constitutional prohibition on a nationwide basis lasted less than 15 years, *i e*, only until 1933 The task of regulating the personal habits of a vast, heterogeneous population—much of it still under the influence of European traditions—proved one of the most difficult that our national government ever has undertaken and public sentiment turned so decisively against the amendment and the measures adopted for enforcement of it that in December, 1932, a resolution for repeal passed both houses of Congress by the necessary two-thirds, with votes to spare "The Eighteenth Amendment,' ran the proposal, ' is hereby repealed ' And then, in order to protect states which had prohibition laws and wished to retain them "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited" Starting in Michigan and Wisconsin in April, 1933 the amendment swept through the specially chosen conventions (now employed for the first time) with such speed that the thirty-sixth state to ratify (Utah) was reached on December 5 All, indeed, eventually ratified except two—the Carolinas Accordingly, on the date mentioned, the Twenty first Amendment was duly proclaimed, and the ill-fated noble experiment' launched by the Eighteenth—having demonstrated how inadvisable it is to put into the constitution anything not clearly supported by public opinion—passed into history

*Twenty-second Amendment*

Notwithstanding much difference of opinion, the constitution's framers gave the president the relatively brief term of four years but left him indefinitely eligible to reelection Before the nineteenth century was far advanced, sentiment developed for lengthening the term to six years but forbidding reelection, and in 1913 a con-

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a Republican Congress submitted to the states an amendment retaining the four-year term, but permitting no more than two full terms, in addition to possible filling out of as much as half of an unexpired term—in other words, a maximum tenure of 10 years State ratifications were rapid in 1947, scant from then until

[8] On unusual circumstances however Congress still may operate temporarily on a 'lame duck basis, as it did in 1950 by reassembling after the election

1951, but in the latter year carried swiftly and somewhat unexpectedly to the necessary 36, whereupon the Twenty second Amendment—the first in 18 years—was duly proclaimed

Observations on the amendments as a group

Looking over the 22 adopted amendments as a group, one observes three or four significant facts (1) In the main, they deny powers rather than confer them Sometimes (as in the first eight) it is primarily the national government that is restrained, sometimes (as in the Civil War group) it is primarily the state governments But in any event most of the number are restrictive rather than otherwise (2) The amendments therefore are only slightly responsible for the remarkable growth of governmental functions and activities in the last few decades, even the phenomenal extensions of federal power associated with the New Deal and World War II came without any change whatsoever in the written fundamental law From one amendment, it is true, the federal government derived the exceedingly important power to tax incomes, and from another, the power to enforce prohibition of the liquor traffic But that is about all, and the second of these powers has of course, been withdrawn If it be asked how so much could happen without more resort to amendments, the answer arises immediately that there has been frequent, indeed continuous resort to amendment—but amendment taking the form, not of changes in a printed text, but of fresh and broadened interpretations of words, phrases, and clauses happily chosen a century and a half ago to permit precisely such flexibility, and some comment on how the living working constitution grows within the framework of a relatively static document—how the constitution is 'amended without amendments —will be added presently (3) While, however, the amendments as such have not conferred many powers on the national government, they have imposed enough restrictions upon the states to have augmented national supremacy indirectly and hence may be said to have had an over-all nationalizing effect (4) Various amendments have broadened the popular base of government by requiring (a) all persons except Indians not taxed to be counted in apportioning congressional seats among the states, (b) all senators to be elected by the people instead of by state legislatures, and (c) all qualified citizens (including women), regardless of race or color, to be made voters in every part of the country (5) Except in so far as affected (a) by these regulations (b) by the altered method of electing the president and vice president, (c) by changes in the calendar of congressional sessions and presidential terms, and (d) by restriction of presidential tenure, the operating machinery of government has not been touched We must look elsewhere if we are to discover the great changes in American government

Amendments pending and proposed

Although pending since 1924, and widely regarded as to all intents and purposes dead, one amendment—empowering Congress to 'limit, regulate, and prohibit the labor of persons under 18 years of age"—still (1952) is officially before the states for ratification [*] Other proposals, repeatedly urged upon Congress, and in one or two instances standing some chance of eventual submission and adoption, include

[*] See p 458 and for text the Appendix below To 1937 state ratifications numbered 28 but there have been no later ones.

1 An amendment abolishing the electoral college and proportioning the electoral voters of a state for president and vice president to popular votes polled [10]

2 An equal rights" amendment sponsored for a generation by the National Woman's party, unfailingly introduced in every session of Congress since 1923, approved by the Senate (but not the House) in 1950 by the necessary two-thirds vote, and reading 'Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

3 An amendment reducing the quota of senators necessary to assent to the ratification of treaties from two thirds to a simple majority, or, as an alternative, requiring treaties to be submitted to both branches of Congress, with a majority in each sufficing for assent

4 Another empowering Congress to straighten out the tangle of existing marriage and divorce laws by enacting uniform legislation on the subject

5 Another empowering the president to veto single items in appropriation bills

6 Another prohibiting poll tax qualifications for voting in federal elections

7 Still another making all bonds and other securities issued by state and local governments liable to federal taxation

In the opinion of many good authorities, the last two objectives could, however, be attained by ordinary legislation, with no constitutional amendment required

## CRITICISM OF THE AMENDING PROCESS

*1 On the ground that it is too slow and difficult*

Madison believed that the modes of amendment agreed upon by the framers guarded 'equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate discovered faults", and, on the whole, history has sustained his judgment Chief Justice Marshall, however, characterized the amending machinery as "unwieldy and cumbrous', and many times later it has been criticized sharply, on one or another of four principal grounds (1) that procedures under it are too slow and difficult, (2) that, on the contrary, they are too easy, (3) that they are too far removed from direct action by the people, and (4) that they afford too much opportunity for minority decisions Half a century ago, the opinion was prevalent that no more amendments would be found possible unless the amending process were made easier, and farmer and labor interests, anxious for legislation which the Supreme Court seemed likely to block as long as the constitution s definition of congressional powers stood unchanged, were prolific in proposals for lowering the vote in Congress requisite for submitting amendments (usually to simple majorities), or the number of states required for ratification (commonly to two-thirds), or both The adoption, however, of four amendments of large economic and social import within the space of seven years (1913-20), and of two others of much significance in the single year 1933, proved that, after all, the constitution's provisions are less immutably "frozen" than many had imagined

*2 On the ground that it is too easy*

Hamilton devoted almost an entire number of *The Federalist* to arguing that the amending process could not have been made any easier without inviting constitutional instability, [11] and the speedy ratification of the Eight-

10 See pp 188 190 below

11 No LXXXV (Lodge s ed, 544 552)

eenth Amendment by legislatures of states in which, both before and after the advent of national prohibition, the people in informal state wide referenda had voted against the proposal led many persons to believe that in point of fact the amending process was easier than it ought to be For some years, therefore, proposed changes looked chiefly in the direction of making it more difficult However, people who were disturbed because of the ease with which the Eighteenth Amendment swept through the state legislatures were elated over the equal facility with which the amendment repealing it was carried, and nowadays little is heard of the earlier complaint

3 On the ground that it is not sufficiently democratic

There has been the criticism, also, that, in the absence of any provision for direct popular proposal of amendments or for submission of amendments to popular vote, the system is insufficiently democratic, and in 1912 the elder Senator Robert M La Follette brought forward a now forgotten plan designed to meet the objection Submission of the Twenty first Amendment to conventions in the states chosen for the sole purpose of acting on the proposal, and composed of delegates prepared to vote as instructed, put the fate of that amendment very definitely in popular hands There is, however, no guarantee that this procedure will be followed again Besides, there still are those who prefer that action on amendments be taken by the people directly [12] rather than even by specially elected and instructed convention delegates, and several amendments looking to that end have been proposed

4 On the ground that minorities may control

Finally the amending process has been criticized because of the possible consequences of giving all states, regardless of population, an equal voice in ratification Any combination of 36 states can make an amendment effective But 36 could readily be found which among them would contain barely one-third of the country's inhabitants, and in the face of such a combination the other two thirds would be helpless Conversely, any 13 states can defeat an amendment, and 13 could be listed which together would have hardly one-twentieth of the total population Such unbalanced groupings it is true, are quite unlikely to arise, except in the very improbable case of an amendment definitely harmful to small states as such states both large and small will be found on both sides of every proposal It does, nevertheless, remain true that, even without any all round combination of small states against large, (1) a *sufficient number of states mostly* less populous can give effect to an amendment not desired in states with a greater aggregate of population, and, on the other hand, (2) an amendment favored by states having such numerical *preponderance may be defeated by a more or less fortuitous combination of* barely more than a quarter of the 48 containing decidedly fewer people From both possibilities the mainly agricultural, less densely inhabited, states of the West and South derive at least potential advantage over the populous industrial East

Changes in amending procedure improbable

All things considered, changes in the amending procedures described seem improbable In the first place, we have discovered that the constitution can, after all, be amended with reasonable facility, six major amendments within 21 years (1913-1933) is no mean record In the second place, improve

[12] As on amendments to state constitutions in all states except Delaware See p 579 below

ments have been achieved within the limits of the procedures now existing (1) a principle concerning reasonable time limits for ratifications has been worked out and applied, (2) after lying unused for nearly a century and a half, the device of ratification by conventions, rather than by legislatures, has been brought into play, suggesting some presumption that hereafter Congress will, on each occasion at least weigh the relative advantages of the two methods before prescribing either of them [13] In the third place, while the Supreme Court has ruled that a popular referendum cannot be substituted for legislative action or allowed to upset a legislative ratification, popular mandates to conventions when such are employed, and "advisory" referenda as guides for action by legislatures when these are used, would seem to furnish about as much democratic control as can reasonably be asked Finally, the arrangements permitting of undesirable, but actually rare and improbable, minority decisions are so inherent in the federal system that they hardly can be eliminated as long as that system stands

## OTHER MODES OF CONSTITUTIONAL GROWTH

Because of the special procedures required for adopting formal amendments, our national constitution often has been described as rigid rather than flexible—too rigid fully to meet the needs of a dynamic, changing democratic society The criticism however, hardly is well founded For, although changes in the written fundamental law admittedly require a good deal of effort, they always are attainable if backed by sufficient sentiment, and, more important, three quarters or more of the document's clauses leave a door wide open for rich and varied constitutional development merely through interpretation Here, indeed, rather than in its text, is chiefly where the actual constitution grows, and, although multiplied illustrations will be furnished in later chapters, attention may be fixed at once upon four principal channels through which interpretation and expansion take place (1) legislation, (2) executive and administrative action, (3) judicial decision, and (4) usage or custom

1 Legislation

Desirous of avoiding what one of them called "a too minutious wisdom," the framers of the original constitution outlined clearly enough the general structure and function of the new government, but wisely left a multitude of matters to be taken care of, as need should arise, by Congress, and even at certain points by the state legislatures For example, they assumed the existence of executive departments, and twice referred in the constitution to the heads of such establishments, yet left Congress not only to create the departments (and the vast administrative system under them), but to determine how many there should be, what they should be called, how they should be organized, and what should be their functions and interrelations The composition of the two houses of Congress was prescribed carefully But the times, places, and manner of electing both senators and representatives were left to be fixed by the state legislatures, subject to control by Congress, [14] and in a

[13] When submitting the presidential tenure amendment in 1947, however Congress almost completely ignored the convention method of ratification

[14] Except that Congress might not regulate the places of electing senators

somewhat belated statute of 1842 on the election of representatives, and another of 1866 on the election of senators, Congress amplified the constitutional law of this subject in much detail Again, the judicial power of the United States was vested in 'one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish "[15] Aside from the Supreme Court, therefore, the entire federal judicial establishment—the names, numbers, grades, and jurisdictions of the courts, together with their procedures—rests upon acts passed from time to time by Congress And so one could go on The constitution bestows power to 'regulate commerce among the several states', but Congress says what commerce includes and creates the required regulatory agencies like the Interstate Commerce Commission and the Federal Communications Commission The constitution confers power to govern dependent territory, but for particular territories the means and methods are provided by Congress The constitution authorizes borrowing money, but it was Congress that devised the national banking system making such borrowing feasible It is Congress that prescribes how electoral votes cast for president and vice president shall be counted and who shall succeed to the presidency when the office falls vacant in midterm Every time, in fact, that Congress enacts a law it in effect, starts with some express *or implied constitutional provision, interprets it, and applies it, perchance in* some new area or in some new manner, thereby projecting the constitution into a new field or extending its meaning in an old one In doing these things, Congress, of course, does not have a completely free hand Its constitutional interpretations may be challenged and the courts may overrule them But in the great majority of cases they stand, and legislation thus becomes one of the principal means by which the constitution develops

2 Executive and administrative action

Although *restricted* by the nature of its function to somewhat narrower scope, the executive branch also interprets applies and adds In the exercise of their powers, many presidents have taken and maintained positions virtually settling constitutional questions previously considered open, or even giving the constitution some meaning or application never before attributed to it Moreover, from the White House this function of constitutional interpretation and adaptation filters down through the various levels of administration Confronted almost daily with need for making decisions, heads of departments, and even inferiors within their proper spheres, adopt positions, perform acts, or give orders resting, however remotely, upon some construction of a constitutional provision, and perhaps stretching the provision's meaning, and when such actions escape successful challenge and establish themselves as precedents, the constitution may be found to have undergone permanent extension, in however limited a particular

3 Judicial interpretation

Then there is the even more significant matter of constitutional interpretation by the courts How this comes about must already be apparent. Congress, or a state legislature, passes a law, or a national or state official performs an act, which some person or group of persons affected adversely challenges as exceeding proper authority A case is brought in the courts, and the law

[15] Art. III § 1

or action is attacked as being unconstitutional, whereupon the judges must decide whether the charge is well founded—in other words, whether the measure or act is or is not in conformity with constitutional provision or reasonable implication from such To do this, it is, of course, necessary to determine what the pertinent constitutional clauses mean, and this opens wide opportunity to make them mean something different from, and probably more than, they had been supposed to mean, with the result of giving the constitution a new twist or slant Moreover, the procedure works cumulatively A disputed word or phrase is so interpreted as to give it new scope and content This, in turn, furnishes a point of departure for a further extension when the next similar case comes up And so the process goes on, the lines of development being 'pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began " [16] Nearly all of the more important implied powers of Congress, as distinguished from the 18 powers concisely enumerated in the eighth section of the first article, are traceable to this source, and these implied powers never have been projected farther into new areas than during the past two decades The most important single reason why the written constitution has not been amended more frequently is that from an early stage in the nation's history the federal Supreme Court has sat as a "continuous constitutional convention,' interpreting, developing, and expanding the basic law One almost may say that every time the Court hands down one of its periodic batches of decisions, we have a constitution which is in some respects new

4 Usage or custom

'Time and habit," remarked Washington, "are at least as necessary to fix the true character of governments as of other human institutions", and so it comes about that still another mode by which our national constitution expands and develops is interpretation of more casual aspect expressing itself in usage or custom This method of change attracts less attention than the others, it does not—at all events at the outset—result in amendments, laws, or judicial decisions Superimposed, nevertheless, upon the instrument of 1787 and its formal amendments, upon the laws that amplify and the decisions that extend it is a broad and steadily developing "unwritten constitution," consisting of usages determining actual governmental practice quite as truly as do the provisions of written law—in fact sometimes more truly, considering that no small number of such usages have had the effect of turning written law into unintended channels, or even of reducing it to a dead letter Plenty of illustrations will be encountered as we proceed, for the present, it must suffice merely to call to mind the wholly unintended manner in which the electoral college now functions in choosing the president and vice president, the assembling of department heads in the advisory body known as the cabinet, the caucus and committee systems in Congress, the custom requiring members of the House of Representatives to be residents of the districts for which they sit, and the apparatus (caucuses, conventions, committees, platforms, funds) of political parties—organizations themselves quite

[16] W B Munro *Government of the United States* (5th ed ) 71

unknown to the written constitution, although nowadays regulated somewhat by statute

"The living word and deed of living men"

The general theme need not to be elaborated farther The upshot is that the bare outline of a governmental system contained in the written constitution as it came from the hands of the framers, and as it still can be read in the books, has been expanded and filled in—by amendment, executive action, statute, judicial construction, usage—until it has come to be one of the most elaborate and complicated plans of political organization and procedure known to history And the process goes on unceasingly This does not prevent some people from clamoring for a "modernization" of the constitution, or even for "a new constitution now" What they fail to recognize is that we actually *have* a new constitution now, and shall have another tomorrow, and still another the day after As "the living word and deed of living men," the constitution of our times is the work of John Marshall, Andrew Jackson, and Abraham Lincoln—of Woodrow Wilson, Mr Justice Holmes, Senator Norris, and Franklin D Roosevelt—no less truly than of Hamilton, Madison, Franklin, and Morris When the fundamental law no longer lives and grows, flexibly and spontaneously, the nation which it serves, and as we have known it, will have become a memory

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# CHAPTER 3

## The American Constitutional System—Principles and Patterns

The American concept of government

When our eighteenth-century ancestors risked their lives and fortunes by taking up arms against the mother country, they did so, not because they had ceased to regard themselves as Englishmen in a new home, but only because of what they considered persistent violation of cherished rights and immunities brought from the old home, and after independence was won, their political philosophy still was in the main that underlying the English revolution of the seventeenth century as persuasively expounded in the writings of John Locke Already, however, experience under New World conditions had imparted new twists and slants, as time went on government developed on lines quite different from the English, and gradually there arose an over-all concept or view of government which, however widely shared elsewhere, may be regarded as characteristically American To analyze and interpret this monumental concept, imposing volumes have been written In essence, however, it breaks down into half a dozen propositions which can be stated briefly

1 No society can be well ordered or even endurable, without government strong enough to keep it on an even keel, yet also wise enough to rule without becoming dictatorial and oppressive

2 Far from an uncontrollable instrument of an irresponsible state, as in totalitarian regimes, government properly is the servant of those who live under it and should at all times be subject to their will

3 As a corollary, government must be kept under leash with written fundamental laws or constitutions fixing the metes and bounds within which it may operate

4 These metes and bounds must be so drawn as to leave ample scope for rights and liberties of the citizen, yet without inviting license and abuse

5 Equality of opportunity must be promoted and equality under law solemnly guaranteed

6 Government must be not only constitutional and representative, but also democratic, with rule by majority assured

*On plenty of matters, e g the fields of activity into which* government may justifiably extend its regulating authority, there may be, and are, wide differences of opinion But, however unformulated in their minds it may be, nearly all Americans actively or tacitly subscribe to the general view outlined Law, order, freedom, equality, democracy—these are the shining facets of their belief

## PRIMARY CONSTITUTIONAL PRINCIPLES

*1. Limited government under written constitutions*

Within this broad framework, certain basic constitutional principles may be spelled out a little more fully. To start with, all governments in the United States function under the prescriptions and restraints of written constitutions. Speaking broadly, the America of 1787 had grown up under such a tradition. The mother country had not then, and has not now, a constitution wholly, or even mainly, in writing. There was, however, and is today, an English constitution in the valid sense of a body of principles and rules, partly written, partly unwritten, partly law and partly custom, under which all government was, and is, carried on.[1] Moreover, within the experience of Americans (if the colonists may be termed such), the charters under which the seaboard settlements were founded were to all intents and purposes constitutions, so were the commissions issued to the governors of royal provinces in later days, and, of course, not only did every "original" state emerge from the Revolution with a formal constitution (in two instances, merely old charters refurbished), but every state subsequently admitted to the Union was similarly endowed. The constitution which took form in 1787, too, was the second one framed for the country as a whole.

In the American sense, a constitution is a fundamental law framed and adopted by procedures giving it superiority over ordinary laws, defining the basis on which a government rests, fixing the scope of governmental powers, specifying organs or agencies for exercising such powers, enumerating and protecting civil rights and liberties, and in general supplying a framework within which governmental organization and action are to proceed. And in the American system all governments, national, state, and local, are so circumscribed (being therefore in every case a government of limited powers) and all people are so safeguarded. This, too, is of more significance than sometimes realized. Not only are different governments on different levels kept within the spheres marked out for them and hopeless confusion averted, but authority is defined, obligations of both government and people clarified, and—most important of all—avenues opened for the settlement of controversies by regular, legal, peaceful means. The only significant dispute in the nation's history which failed to be adjusted peacefully on constitutional lines was that leading to the Civil War, and even it was settled by invoking powers for which the federal constitution plainly provides. In any event, every man, woman, and child in the 48 states lives under and is subject to both a national and a state constitution. All live also under city charters or legislative measures creating and regulating counties and other local units—instruments which, although not in form constitutions, nevertheless are organic acts of similar nature.

The Declaration of Independence affirmed as one of its "self-evident truths" that governments derive their just powers from "the consent of the

[1] On the English constitution's characteristics, see F. A. Ogg and H. Zink, *Modern Foreign Governments* (New York, 1949), Chap. ii.

2 Popular sovereignty

governed " The opening sentence of the constitution reads "We, the people of the United States, do ordain and establish this constitution " And in defending the scheme of government provided for in the then newly drafted fundamental law, Madison, in one of his *Federalist* papers, declared it not only motivated by belief in "the capacity of mankind for self-government," but truly republican in that all powers under it were derived "directly or indirectly from the great body of the people " [2] If any principle of the American constitutional system has been axiomatic from the beginning, it is that the people are sovereign

Who are *the* sovereign people ?

The principle has only to be stated, however, to raise questions The people are sovereign—but *what* people? And in early days, this went to the very heart of the new constitutional regime Under the Articles of Confederation, the states were so separate and self contained that their populations unquestionably were individually sovereign, in other words, there were 13 sovereign peoples, each acting through a state government sometimes itself referred to as sovereign On this, everyone was agreed But what had been the effect of adopting the new constitution? None at all in this respect, contended men like John C Calhoun, wedded to states' rights doctrine, back of each state government, they insisted, still stood a separate sovereign people Sharply dissenting, persons of nationalist persuasion, on the other hand, considered not only the states to have been absorbed into an indestructible union, but their several populations to have been fused into a single sovereign people—the one people, indeed, in whose name the constitution had been framed and adopted The latter view prevailed, and nowadays, sovereignty under our constitutional system is attributed only to the people of the country as a whole But a civil war was required to settle the matter

Even with this cleared up, however, there still are questions Is the sovereign people the *entire* population—men, women, and children, both citizen and alien? Or is it only some portion thereof? In a general way, it perhaps may be viewed as embracing all adults But the essence of sovereignty is power of control over public affairs, and not all adults share such power In construing the term "people" as employed in the constitution's preamble, the courts have made it tantamount to 'citizenry," which at once excludes aliens, and, in relation to sovereignty, it would be realistic to exclude also citizens not endowed with the ballot, of whom there still are a good many In other words, the *sovereign people* of the United States, accurately viewed, consists simply of those entitled to wield power at the polls in controlling the government, and, back of that, in maintaining and amending the federal constitution In these days, however, this means upwards of two-thirds of the total population

The limits of *sovereignty*

"Sovereignty" is a strong word Is there any legal limit to what a sovereign people may do? Certainly the people of the United States as a sovereign may determine the kind of government they will have, the powers it may wield, and how these powers shall be exercised, and all of these things they actually have done Might they even abolish the entire existing governmental system and put something different—a monarchy, or even a Communist regime—in its

[2] No xxxix (Lodge's ed 232 233)

place? On the right of a people to "alter or abolish" any form of government failing to serve the purposes for which government exists, and to 'institute new government," the Declaration of Independence was perfectly explicit, and a generation grown up in an atmosphere of revolution could and did, talk freely about the "right of revolt' Perhaps, in theory, such a right still exists *So long as the constitution stands however, any attempt to replace our existing* form of government by a different one could be legitimate and legal only if undertaken peacefully and through the channels which the constitution itself provides For looking toward overthrow of the government by unconstitutional means, including force, Communists properly are viewed as subversive elements to be watched and curbed

3 Representative government

In a very small political area, the people may be able to exercise basic governmental functions directly as still is widely done through town meetings in New England On higher levels too, they may participate directly in law making as in a score of our states sometimes employing the popular initiative and referendum for the purpose By and large however, a necessary corollary *of popular sovereignty is government, not by direct democracy, but through* elected representatives, and under our system the legislative branches of both national and state governments, the chief executives of both, various other executive officials in nearly all states judges in most states, and the majority of administrators, councils, boards and other authorities in counties and cities are chosen, under one procedure or another by the voting elements in the populations which they serve For the actual conduct of government the people depend almost entirely not upon direct action on their own part, but upon persons and bodies thus intrusted by them with power

4 Separation of powers

Circumscribing government with constitutional restraints and underpinning everything with popular sovereignty are but two of the means by which arbitrary *actions and despotic* controls are fended off in our system Two others are separation of powers and federalism The idea that government divides into three main functions, the making enforcing, and interpreting of laws, giving rise to legislative, executive, and judicial activities, and that prudence requires the three to be placed in different hands as a safeguard against dangerous concentration of public power, is as old as Aristotle Locke Montesquieu Blackstone, and other seventeenth *and eighteenth century writers well* known in America expounded it convincingly And not only did it find some recognition in most of the colonial governments, but every Revolutionary (and later) state constitution asserted it in some form and set up a government planned in terms of it [3]

How provided for in the constitution

In the Articles of Confederation, creating at best only 'half a government" (or even less), separation had no place, all powers, such as they were, were vested in a single authority, *i e*, the Congress With national government broadened, however, under the later constitution to include a full array of

legislative, executive, and judicial functions, the framers had no hesitancy about invoking the separation principle and applying it throughout, only by so doing, they believed, could the greatly enlarged powers now conferred be prevented from gravitating together in the hands of ambitious and unscrupulous men to the detriment of the people Nowhere in the document, it is true, is the principle expressly proclaimed, as in most state constitutions But the same purpose is served by the opening sentences of the first three articles, assigning "all legislative powers," "the executive power," and "the judicial power to the three several branches of government with which the articles, respectively deal And the Supreme Court has construed this to mean that the powers allocated to the different branches may not be combined in any one branch or those given to any one branch delegated by it to any other branch [4]

Checks and balances

Nothing was more manifest to the constitution's planners, however, than that the principle could be carried too far, to prevent separate branches from encroaching upon one another, and to avert deadlocks and breakdowns, some checks by one branch upon another must be supplied Accordingly, to the principle of separation was joined (as also is done in the states) that of "checks and balances,' designed to promote unity and equilibrium Thus the president shares in the legislative power through his right of veto, and the courts through their authority to make rules of judicial procedure and especially to interpret laws and invalidate them as unconstitutional The Senate can confirm or reject the president's appointments and approve or disapprove ratification of his treaties, and Congress as a whole may override his vetoes, defeat his legislative proposals, and refuse his requests for appropriations Through power of impeachment, Congress shares, too, in the judicial function—to say nothing of its rôle in creating courts defining their jurisdictions, and regulating the number and pay of judges President and Senate also share the power of judicial appointment [5] Certainly such arrangements bear out Madison's observation that separation of powers does not require legislative, executive, and judicial branches to be "wholly unconnected with each other"

Disadvantages of separation

No feature of American government, national, state, and often local, is more characteristic than this separation of powers, combined with precautionary checks and balances Nothing quite like it can be found in any other leading country of the world While, however, most of our people undoubtedly still believe in it, there also is dissatisfaction, on the grounds chiefly that it prevents unity, frustrates leadership divides responsibility, and slows up action Troubled, for example, by frequent and harmful conflicts between president and Congress, many persons consider that we would be better off with a good deal less separation—perchance even with a "union of powers" such as one finds in the English cabinet system, and at a later point notice will be taken of certain proposals for bringing the national executive and legislature closer together while still maintaining them as distinct branches [6] Somewhat ironically,

[4] See, for example, [illegible]

even checks and balances, designed to promote over all equilibrium, often operate rather to aggravate than to ameliorate the ill effects of separation, as for example in the cases of the presidential veto and senatorial assent to treaties On the local level where separation early became the rule for no better reason than mere imitation of national and state models, the device has been widely discarded, notably in some 1,500 commission and council manager cities On national and state levels, however, it continues firmly entrenched with hope for overcoming its admitted disadvantages pointed rather in the direction of voluntary political accommodation than of formal constitutional change

5 Federalism

Rumor has it that, at a critical moment in the proceedings of the Philadelphia convention, Alexander Hamilton irked by obstacles to the national centralization which he favored, petulantly exclaimed that the states ought to be abolished Of course neither Hamilton nor any one else ever for an instant supposed any bold step like that to be possible Far to the contrary if there was one thing above all else that the constitution's makers were bound to do, it was to keep a place in the new system—and a very important one at that—for the states, whose delegates they were, and without whose approval their work might as well never have been done All of the existing states were carried over from the old constitutional regime into the new one with their names boundaries, and governments unchanged and with functions and powers curtailed, it is true, but nevertheless still extensive and fundamental Furthermore, the constitution authorized Congress to admit new states to the Union, and from 1791 onwards this power was exercised as the Southern and Western portions of the country filled with population, until in 1912 the admission of New Mexico and Arizona brought the number to the present 48 Ours is therefore a federal form of government The people of the country are not thrown into a general mass, under a single government endowed with full powers exercised from one center On the contrary, while all are directly under one national government for certain purposes, they also are under one or another of 48 state governments which are not mere arms of the national government, but agencies of original, separate, and to a considerable extent independent, political units National and state governments stand side by side, each with its own officers, functions, and fields of action, and with powers distributed through a superior law, the national constitution, with which neither the national government nor any state government is entitled to tamper

"An exciting adventure"

A dual system like this was the only one that could have been agreed upon under circumstances existing when the constitution was adopted In instituting it, nevertheless, the framers opened a field for doubts and controversies around which much of our later constitutional history has revolved In the first half-century or more, the very nature of the Union was in dispute, with that settled, contention continued over the proper scope and relations of national and state powers The first question was essentially whether the effect of the constitution was to create a sovereign and indivisible nation in which the states were inextricably embedded, or whether the states—acknowledged to be distinct, original, indestructible political entities—still were "sovereign" and free to

withdraw if they desired, and the answer gradually arrived at—through nationalizing decisions of the Supreme Court, failure of attempts at state nullification, frustration of secession, and over all effects of social and economic developments—was that the states are not sovereign and cannot secede, that the Union is supreme and perpetual When in 1869, the Supreme Court pronounced the nation "an indestructible Union of indestructible states," [7] it merely registered the verdict of history

The question of powers has lent itself to no such finalty, nor indeed can ever do so Hardly a power granted the federal government in the constitution, and for that matter hardly a power left to the states, is immune from differences of opinion on meaning, scope, and applications, indeed, in a dynamic, changing society governmental powers definitely cannot be defined and circumscribed with such precision and permanence as to prevent them from being construed differently in the face of new circumstances and needs In a country like England, with all public authority concentrated in a single national government,[8] little difficulty arises But our system is federal, not unitary, and no legerdemain of constitutional phraseology can prevent the resulting partitioning of powers from giving rise to endless doubts and challenges along tortuous border lines From the time when the nature of the Union began to stir debate, federalism has proved an exciting adventure

## DISTRIBUTION OF POWERS

onal powers

Fixing attention first upon nation state relations as constitutionally defined, and in a later chapter [9] upon certain of their practical developments, we start with three basic facts First, the national government has only those powers expressly delegated to it or reasonably to be inferred therefrom Such was plainly the intent of the constitution as originally adopted Some doubt, however, having arisen, the Tenth Amendment fixed the principle beyond all possible challenge Specific grants of power (and some of more general character) are made to Congress, to the president, to the courts, but, says the Amendment "all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people ' No reader of this book will need to be told that the powers wielded by the national government are immeasurably greater today than in the times of Washington and Jefferson At some points, they appear to a good many people to have been carried considerably beyond the limits of reasonable inference from grants made, indeed, in 1941 the Supreme Court boldly declared the Tenth Amendment less of a restriction than had been supposed [10] In the eye of the law, however, whatever expansion has taken place—except in taxation and one or two other areas where changes have been authorized by constitutional amendment—has resulted solely from progressively wider

[10] United States v Darby 312 U S 100 (1941)

and more penetrating applications of powers already possessed President, Congress, and courts have no proper authority except such as can be found somewhere (as express provision or by fair inference) within the four corners of the constitution [11]

State powers

A second fact is that the state governments, on the other hand, have powers not conferred in the federal constitution, but original, 'reserved' or residual," and largely undefined A certain number, it is true, are mentioned in the document But there is no attempt to present a list Carrying over into the new system the great bulk of powers previously possessed (and they never would have ratified the constitution unless permitted to do this), the original states have ever afterwards enjoyed the ample and indeterminate sweep of authority thus acquired, buttressed too by the Tenth Amendment—a breadth of jurisdiction which, although curtailed at some points by nationalizing constitutional amendments, by legislation, and by judicial decisions, has expanded considerably more than it has contracted, notwithstanding the common impression that it is the powers of the national government alone that have been magnified in these later decades [12] And of course, under the principle of state equality, all states subsequently admitted to the Union are entitled to, and possess, a similar scope of authority

No government's powers unlimited

A third fact is that, while both national and state governments have extensive powers, and indeed many powers in common no government in our system has unlimited powers The national government has *only the powers delegated* to it, expressly or by implication, the state governments, although with powers undefined and unenumerated, are restricted at many points by the federal constitution and at still more by the state constitutions, and measures enacted by either Congress or a state legislature (acts too, performed by executive or administrative authorities), if regarded as exceeding the limits of powers constitutionally fixed, are practically certain sooner or later to be challenged in the courts, and may be held null and void Taken together, the federal and state constitutions thus leave, and in fact create, areas of immunity—of no government, so to speak—within which people may not be interfered with at all by public authority, and the Ninth Amendment gives such areas significant flexibility by specifying that the enumeration of certain rights (or liberties) in the federal constitution "shall not be construed to deny or disparage others retained by the people "

[11] *The view of Theodore Roosevelt and others* that all powers of a *general* nature i e ... properly belong to it even though not granted was expressly ... (1902) With respect to ... ly recognized (in United ... t even if the constitution ... plomatic intercourse and ... "necessary concomitants ... inferred from the mere ... predicated in the con

... only to compare the list ... finance education ... tion of transporta ... one of the states

The resulting pattern

For purposes of summary, the over-all situation therefore analyzes as follows

## POWERS SPECIFICALLY GRANTED OR DENIED THE NATIONAL AND STATE GOVERNMENTS BY THE CONSTITUTION

| POWERS GRANTED | | POWERS DENIED |
|---|---|---|
| 1 To the national government exclusively (e g conducting for [illegible] |   | 1. To the national government only (e.g., levying direct taxes otherwise than in proportion to population*) |
| 2. To the states exclusively as being appropriate to their status and not forbidden (e g conducting elections establishing local governments regulating intra state commerce controlling the law of wills contracts torts and domestic relations) |   | 2. To the state governments only (e.g., making treaties, levying general taxes on imports, issuing bills of credit, coining money, passing laws impairing the obligations of contracts) |
| 3 To national and state governments concurrently conferred on the former and not withheld from the latter (e g enacting laws, maintaining courts levying taxes, borrowing money chartering banks) |   | 3. To both national and state governments (e.g., taxing exports, passing *ex post facto* laws and bills of attainder, granting titles of nobility, abridging the right of United States citizens to vote on account of race, color, or sex, depriving persons of life, liberty, or property without due process of law). |

* Under the Sixteenth Amendment the limitation does not apply to income taxes whether or not considered direct

## THE PRINCIPLE OF NATIONAL SUPREMACY

The supreme law

Under our federal system the national government is supreme within the sphere assigned to it, the states no less so in the sphere reserved to them Contrary, however, to a view once widely held and still occasionally encountered, this does not mean that nation and states stand on a footing of equality Such a notion, indeed, ought to be completely dispelled by one clause of the constitution, if no other 'The constitution," we read, "and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the

*supreme law of the land,* and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding "[13] In other words, while the state governments may be, and are, supreme within their reserved spheres, these spheres are circumscribed not only by the delegation of numerous vital powers to the national government, but by the basic operating principle that whatever the national government ordains—within the broad and still expanding area of its authority—is *supreme law,* enforceable as such and binding no less upon state executives, legislatures, courts, and people than upon officers and people of the nation itself Nothing of this sort can be said for the laws or actions of any state So long, it is true, as these go unchallenged by federal authority, or indeed if, upon being challenged, they are held to be not inconsistent with that authority, they may be said—so far as the national government is concerned—to flow from "supreme" power within the boundaries of the state If shown, however, to be incompatible with any legitimate exercise of power by the national government, they lose all claim to validity, and many have in this way been rendered of no force and effect

Who is to decide in cases of dispute?

But who is to say whether a state government has overstepped the bounds marked out for it? To this question the constitution gives no direct answer, and there always has been difference of opinion as to what the framers intended To be sure, there was a proposal in the Philadelphia convention that, as a means of upholding the "supreme law' and protecting the Union, Congress should be given power to disallow, or veto, any act passed by a state legislature But although at one stage this was agreed to without dissent, so much opposition developed that the idea was abandoned And for two reasons the decision was wise—first, because the broad grant proposed would have enabled Congress to interfere with state legislation, in a wholly undesirable manner, on political as well as on constitutional grounds (that is, merely on grounds of policy, whether or not any constitutional question was involved), and second, because in the 'supreme law' clause the constitution's authors already had supplied a better approach If state judges were to be 'bound' by national constitution, laws, and treaties as supreme law, "anything in the laws of any state to the contrary notwithstanding,' it manifestly would be their duty to declare unconstitutional and unenforceable any state legislation conflicting with such supreme law To this extent, even if somewhat indirectly, the national constitution provided for—or at least presumed—judicial review as a means of protecting the federal state balance [14]

But who was to guard against *Congress* overstepping constitutional bounds? And would the watchfulness of the state courts prove a sufficient safeguard against transgression by state legislatures? In other words, were the federal

A task for federal as well as state courts

courts also to have power of review, applying to both federal and state legislation? The Virginia plan had proposed to associate with the national executive a council of revision to scrutinize every measure passed by Congress, with any found objectionable taking effect only if reenacted by a two-thirds vote in both houses Presumably a measure might be questioned on constitutional as on other grounds, although manifestly that was not what the authors of the plan were thinking of primarily, and in any event the convention's final decision was to give the veto power to the president alone This left open the question of review by the federal courts But the constitution as adopted said nothing on the point, and as a result there always have been people to argue that the fathers did not intend the federal tribunals to have such power, and that the exercise of it by them is not only unsupported by the letter, but contrary to the spirit, of the fundamental law, and therefore sheer usurpation If the fathers had intended it, they would have said so

A different view, however, won more general acceptance From the records, it appears that the constitution's makers did not remain silent on the subject simply because they had not thought of it, nor yet because they considered it unimportant, but only because they regarded inquiring into the constitutionality of legislation as necessarily embraced in the work not only of the state courts already existing but equally of the national courts about to be established In other words, it was simply taken for granted that the future national courts would, as an incident of judicial power, refuse to enforce as law *either* any act of a state legislature 'contravening ' as Roger Sherman put it, "the authority of the Union,' *or* any act of Congress transcending the proper powers of that body, in so doing, they would simply be upholding the principle of federalism fundamental to the entire constitutional system Thus justified, judicial review becomes, for the judiciary, comparable to the great 'resulting" powers of Congress [15]—a power arising from the very nature of the judicial process when operating under a system of government based upon limitation of powers and distribution of them between two sets of authorities inevitably tending to *encroach upon one another* [16]

As so often is the case, however, fact is here more important than theory, and the fact is that not only did the Judiciary Act passed by the very first Congress in 1789 authorize the federal Supreme Court to review any case in which a state court had upheld a state law alleged to be in conflict with the constitution, with a statute, or with a treaty of the United States, but the power was early brought into play, steadily broadened in scope and application, and has been employed with tremendous effect for more than a century and a quarter An act of Congress was first held void by the Supreme Court on the ground of unconstitutionality in the case of Marbury v Madison, decided in 1803, [17] state statutes were declared void, on constitutional

[15] See p 232 below

grounds, in a long line of cases beginning with Fletcher *v* Peck in 1810 [18] And thus was built up in the federal domain—paralleling a similar development in the states—a function which sharply differentiates our American courts from the courts of Great Britain and most other countries Judicial review has, indeed, been termed America's distinctive contribution to the science of politics [19]

The national government as judge of its own powers

From judicial review as developed by the federal Supreme Court arises a situation of major importance with respect to the boundary lines between federal and state powers In all disputes touching the subject, the last word is, or may be, spoken by nine (indeed by a majority of *five*) federal justices in Washington—which is tantamount to saying that in conflicts of authority between national and state governments, the *national* government makes and enforces the decision, subject only to possible, but unlikely, reversal by a constitutional amendment [20] In the words of a respected writer, the Supreme Court has throughout our history been as impartial an umpire in national-state disputes as one of the members of two contending teams could be expected to be" [21] As an organ of the national government, it has, however, undeniably shown predisposition, if not outright favoritism, toward that government "The states," continues the writer quoted, have had to play against the umpire as well as against the national government itself The combination has been too much for them

Over against the clear principle that the national government is a government of limited powers stands the hard fact that not a limitation on its authority in relation to state authority is fixed in the fundamental law which Congress, the president, and the Supreme Court—indeed, merely Congress and the Court—acting concurrently, may not override if they choose Of course, this is speaking legally rather than practically, actually and as a matter of political expediency, Congress will shrink from giving the impression that it is playing fast and loose with constitutional limitations, and if it should grow careless, it is likely to be brought to book by the Supreme Court Marvelous discoveries of previously unsuspected national power have, however, been made, others no doubt lie ahead, and, irrespective of all uncertainties about what still is to come, the frontiers of national authority unquestionably will prove to have been widened permanently since 1933 as in few, if any, other periods in the nation s history All experience, too, goes to show that national power, once asserted and safely past the hurdle of the courts, is almost never relinquished

How is the supremacy of national authority maintained and enforced? Normally, of course, by the ordinary processes of legislation and administration, operating directly upon the people irrespective of states and state governments

more fully in a later chapter dealing
t Britain there is judicial review of
of statutes
may not challenge the acts of the
individual citizens or corporations

rt" *Amer Pol t Sci Rev.*, XXVIII

A task *for fed eral as well as state courts*

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[15] See p 232 below

## CHAPTER 4

# The States Under the Federal Constitution

Our federal system is weighted heavily in the national government's favor How do the states fit into the picture? How are their relations with the nation, and with one another, constitutionally defined?

### ADMISSION OF NEW STATES

First of all how does a state become a state? Until fairly recently, it is true, this might have seemed a rather academic question, even now, no new state has been added to the list in 40 years The past decade, however, has witnessed vigorous efforts looking to the admission of Alaska and Hawaii, by the end of 1951, the two territories had so far advanced toward their goal that enabling acts for both had been passed by the House of Representatives (although not by the Senate) and Hawaii had framed a proposed state constitution,[1] in any event, admission procedures have again come to be of timely and practical concern

"Original" and "admitted" states

What has happened in the past is, of course known to every student of our national history The 13 "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the present constitution The other 35 were brought in, one by one, by acts of Congress Considered from the point of view of previous status or condition, these later commonwealths fall into four groups (1) five which were formed by separation from other states, *i e* Vermont set off from New York in 1791, Kentucky from Virginia in 1792, Tennessee from North Carolina in 1796, Maine from Massachusetts in 1820, and West Virginia from Virginia in 1862 63, (2) one, *i e* Texas, which before its admission in 1845 was an independent republic, (3) one, *i e*, California, which was formed—also without passing through the territorial stage—out of a region ceded by Mexico in 1848, and (4) 28 which prior to admission were organized territories

Process of admission

The constitution confers on Congress general power to admit new states, subject only to the restrictions (1) that no state may be erected within the jurisdiction of any other state except with the consent of the latter's legislature, and (2) that no state may be formed by the union of two or more states or

[1] See p 559 below

parts of states without consent of the legislatures of all states concerned as well as of Congress [2] Ordinarily, the procedure of admission is started by the people of a territory, who, if a substantial proportion desire statehood, petition Congress through their territorial assembly or territorial delegate, or both, to specify and authorize the steps necessary to be taken (commonly simply framing and adopting an acceptable constitution) in order that the t[illegible] may be received into the Union as a state If viewing the petition f[illegible] "[illegible]bling act" under which the people of the [illegible] and if the result- [illegible] when submitted for adoption, it goes [illegible] in turn, finds it satisfactory all that remains is to pass a joint [illegible] ecognizing the territory as a new member of the Union as soon as its elected senators and representatives shall have been seated Occasionally, a territory has omitted the initial petition and gone at once to Congress with its proposed constitution

Special conditions may be imposed

If, as has happened several times, Congress finds something in the constitution as submitted that it dislikes, or fails to find something that it thinks should be there, it will communicate its dissatisfaction to the authorities of the territory, either in the form of a suggestion or in that of a definite requirement to be met as a condition of admission In the latter situation, there is nothing for the territory to do but comply—or wait for a possible change of opinion in the two houses, for without the consent of Congress no territory can become a state, and there is no way of compelling that consent to be given In this manner, several incoming states have been subjected to requirements not imposed upon others [3]

Yet all states legally equal

Such minor differences as arise in this way do not, of course, prevent the states from being true equals in the eye of the law In size, population, wealth, and general importance they, of course, vary enormously The largest, Texas, has an area of 265,780 square miles, the smallest, Rhode Island, contains only 1,250 The most populous, New York, had 14,830,192 inhabitants in 1950, the least populous, Nevada, had 160 083 Average density of population varied, at the same date, all the way from 634 5 per square mile in Rhode Island to 1 4 per square mile in Nevada Some states are almost wholly agricultural, others are mainly industrial and commercial Some are of great weight in the councils of the nation, others count for comparatively little All have their separate and more or less differing constitutions, laws, courts, systems of taxation, and arrangements for local government Nevertheless, in their constitutional and legal status they are equal

[2] Art IV § 3 cl 1

[3] The president too can take exception to a proposed constitution and can veto a resolution providing for admission Whether after admission a state must live up to the terms of a condition imposed upon it depends the Supreme Court has said (Coyle v Smith, 221 U S 559 1911) upon whether the effect would be to restrict the state s independence in managing its internal affairs On this basis Arizona after having been required to omit from its proposed constitution a clause providing for popular recall of judges, restored the provision after admission in 1912 and retains it today Under rulings of the Supreme Court business agreements amounting to contracts between the United States and a new state e g on the use to be made of federal lands ceded cannot however, be so disregarded

## OBLIGATIONS OF THE NATIONAL GOVERNMENT TOWARD THE STATES

1 Protection against involuntary dismemberment

By way of further defining and protecting the position of the states in the federal system, the constitution imposes on the national government three important obligations in their behalf First, every state's geographical unity and integrity must be scrupulously respected No state may be set up within the jurisdiction of an existing state except with the consent of the latter's legislature, nor may any state be formed by uniting two or more states or parts of states unless the legislatures of all states affected signify their approval In other words, a state cannot be deprived of its separate existence, or even of territory, unless it voluntarily agrees [4]

2 Protection against invasion and domestic violence

A second obligation is to protect every state against invasion and (on request) against domestic violence [5] An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and the right and duty of the national government to repel such attack is clear, quite apart from any action independently taken, or any request made, by the state or states affected Repression of insurrections, riots, and other domestic violence is a different matter One of the things that the government of a state is expected to do is to maintain order, and unless such a government, finding itself unable to cope with a disturbance, calls for assistance, national authorities will not intervene, so long, in any case, as national laws are not violated, national functions (*e g*, the postal service) interfered with, or national property endangered If, however, assistance is requested, the president will comply, unless he is of the opinion that the state can and should handle the situation alone, and if national interests are menaced, he will act without invitation, and even against the wishes of state authorities—as when, in 1894, President Cleveland, over protest from Governor Altgeld of Illinois, dispatched federal troops to the scene of the Pullman strike in Chicago for protection of the United States mails

3 Guarantee of a republican form of government

A third requirement made of national authority is that it guarantee to every state a republican form of government [6] Viewing the existing state governments as unmistakably republican, and assuming that therefore every one would understand what "republican" meant the constitution's framers attempted no definition of the term, and with differences currently existing from state to state, it is clear that they did not contemplate requiring any one precise governmental set-up to the exclusion of all others Madison, indeed, assured the people that they would continue to have the right, in their respective states, to 'substitute other republican forms" whenever they chose

[4] It was of course by such agreement that five states enumerated above were split off from preexisting states—although Virginia's wartime consent to statehood for West Virginia was given irregularly by only a makeshift legislature containing representatives of 40 western counties desiring to remain loyal to the Union

[5] Art IV, § 4

[6] Art. IV, § 4

and to claim the federal guarantee in behalf of them But no room was to be left for, as he said, "aristocratic or monarchical innovations"

Who decides whether a state government is republican?

The final judge of whether the government of a state is republican is not the people of the state, but the national government The constitution does not, however, say what branch of the national government shall make the decision Conceivably, it might be the courts In handling cases turning on the nature of republicanism, the Supreme Court, however, always has held that the question is of a political nature, and hence one to be decided, not by the judiciary, but by the government's political branches This leaves it to the president or Congress, or both As for the president, he undoubtedly might declare the government of a given state not republican and use force to dispossess it Indeed, in the single instance in which the guaranty clause was invoked prior to the Civil War, *i e*, the Dorr rebellion in Rhode Island in 1841 42, President Tyler recognized the established government of the state as the rightful one and took steps to give it the aid which it asked against a rival government set up by an insurrectionary element led by Dorr The really decisive factor in the handling of the Rhode Island situation was, however, the action of Congress in continuing to receive the state's elected senators and representatives This, said the Supreme Court when a case growing out of the dispute came before it, constituted valid and final recognition of the state's government as being republican [7] It was Congress, too, that at the close of the Civil War forced the Southern states, as a condition of regaining representation, to adopt suffrage (and other) arrangements which the radical Republican majority at Washington professed to consider essential to a republican form of government Certainly its power to cut off a state from any share in controlling national policy, enacting national laws, and raising and appropriating national funds gives Congress the whip hand in the matter

Tendency to liberal construction

In the Reconstruction period, the term "republican" was construed arbitrarily and narrowly At all other times, however, it has been interpreted broadly and liberally Thus, when a generation or so ago, opponents of the popular initiative and referendum as newly adopted devices of direct legislation in Oregon sought to make out that republican government means only *representative* government, with all laws enacted by elected assemblies, the Supreme Court said simply that the question was one for the political arms of the government, and that as long as Congress continued to receive senators and representatives from the state, the Court would be satisfied [8] And Congress itself took the sensible view that as long as representative institutions are maintained by a state, it does not matter if they are *supplemented* by occasional direct action by the people

[7] Luther v Borden 7 Howard 1 (1849)
[8] Pacific States Tel and Tel Co v Oregon 223 U S 118 (1912)

## CONSTITUTIONAL LIMITATIONS UPON THE STATES

The constitution distributes powers between nation and states on the general principle that whatever is not conferred upon the national government remains to the states—*if* not forbidden to them Much, in point of fact, is so forbidden, giving rise to the "constitutional limitations" about which the lawyers talk, and while one large class of such limitations, having to do with the protection of civil liberties, calls for separate treatment in a later chapter,[9] a more miscellaneous group may appropriately receive attention here

1 Foreign and interstate relations

It is, of course, the intent of the constitution that official relations with foreign powers be conducted only through the national government, and one will not be surprised to find the states unequivocally forbidden to enter into "any treaty, alliance, or confederation A state, it is true, may enter into an "agreement or compact" with a foreign power, but only with the consent of Congress, and only, of course, if not having the effect of creating an 'alliance or confederation," *i e*, a relationship of a political character Except for an agreement between New York and Canada relating to an international bridge, no such agreements or compacts ever have been concluded

Interstate compacts

Agreements or compacts among the states themselves is a different matter These, too, are authorized, subject in general to the consent of Congress, and so useful has the device been found that upwards of 100 "interstate compacts"—concluded usually by governors or through specially appointed commissioners, and ratified by the legislatures of the states concerned—now are on record For a long time, agreements were few and had to do almost exclusively with boundary lines In the last 30 or 40 years, however, they not only have grown more numerous, but have dealt with a steadily widening range of interstate interests To cite but a few illustrations

1 An agreement of New York and New Jersey in 1921 creating the present Port of New York Authority charged with developing the facilities of New York harbor

2 A Colorado River Compact of 1922 (finally effective in 1928) allocating rights to the waters of the Colorado among seven states containing portions of the river's lower basin

3 A Crime Compact of 1934 relating to control of parolees and probationers and ratified by 48 states by 1951

4 A four state compact, first authorized by Congress in 1935 (with 16 other states later adhering), for the conservation and marketing of petroleum resources

5 An Atlantic States Marine Fisheries Compact, assented to by Congress in 1940 and adhered to by upwards of a dozen states, with a view to promoting better utilization of marine fisheries

6 A compact among New England states in 1947 for the abatement of water pollution, and another in 1949 for flood control

7 An Ohio River Valley Water Sanitation Compact, authorized by Congress in 1936 and formally executed in 1948

8 An Upper (Colorado) Basin Compact of 1949 supplementary to the Colorado River Compact of 1922

[9] See Chap 7 below

Other varied matters with which compacts have dealt include park and parkway development, forest fire protection, tobacco production, inland fisheries, and minimum wages. According to the nature of the subject, the states involved may be contiguous or closely grouped, or on the other hand widely scattered—though with a tendency toward agreements of regional scope, and usually some sort of advisory or directive interstate commission, like the Atlantic States Marine Fisheries Commission or the Interstate Oil Compact Commission, is charged with assisting in carrying out an agreement's terms—although, in the final analysis, a compact is merely a "gentlemen's agreement," dependent for enforcement upon moral obligations only. People troubled about growing centralization are likely to find consolation in such devices as "a kind of intermediate arrangement which avoids the centralizing tendencies of federal regulation, whereas the advocates of centralization consider compacts a basis for possible evolution of control from the state to the region and then from the region to the nation."[10]

When is congressional consent necessary?

The constitution seems to make all interstate agreements contingent upon consent of Congress. In practice, however, such consent is not always necessary. Some years ago, New York, New Jersey, and Connecticut simply settled among themselves, and without going to Congress at all, a long-standing dispute concerning sewage pollution in New York harbor. In 1931, Maryland, Virginia, and West Virginia similarly adjusted fishing rights on the Potomac. Ten years later, six Midwestern states independently signed an agreement aimed at higher standards in the dairy industry. As construed by the courts, the requirement of congressional consent applies only to agreements "tending to increase the political power of the states, which may encroach upon or interfere with the just supremacy of the United States."[11] Furthermore, where consent is necessary, it may be given either before or after the compact is entered into, and may be either express or implied. Indeed, blanket permission to make agreements on a given subject may be given before any have actually been undertaken, the New England water pollution compact of 1947 and a similar one (listed above) among Ohio Valley states in 1948 rested on authority conferred by Congress as long previously as 1936. Sometimes, indeed, authority is granted, but no compact actually follows.[12]

2. Defense

In general, defense, like foreign relations, is a national rather than a state function, and without the consent of Congress no state may keep troops or ships of war, or "engage in war unless actually invaded or in such imminent danger as will not admit of delay."[13] The restriction, however, never was intended to preclude the states from maintaining organized militia, for use primarily in repressing domestic disorder, and such militia, although where organized as the national guard has long since been assimilated to the

[10] J. P. Clark, "Interstate Compacts and Social Legislation," *Pol. Sci. Quar.*, L, 503 (Dec. 1935).

[11] Virginia v. Tennessee, 148 U. S. 503 (1893).

[12] A full list of interstate compacts of the period 1934-49 will be found in Council of State Governments, *The Book of the States, 1950-51* (Chicago, 1950), 26-31; also on succeeding pages (32-51) descriptions of several commissions and other agencies operating under some of the number.

[13] Art. I, § 10, cl. 3.

armed establishment of the nation, remains at bottom a state instrumentality

Speaking generally, the states are free to levy and collect taxes as they choose, for revenue or with other objectives in mind, and many differing tax systems have resulted There are, however, constitutional limitations—either expressly imposed or implied in general clauses, or even in the inherent nature of the federal state relation *i e* the concurrent operation of two distinct and largely independent governments over the same people and territory The restrictions expressly specified are that no state shall, without the consent of Congress, lay (1) any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," or (2) any duty on tonnage [14] Import and export duties laid by state authority are subject not only to validation but to revision and control, by Congress, and, further to discourage such taxation all net proceeds are required to be turned over to the national treasury State imposed import and export duties—tonnage duties likewise—were not uncommon in the earlier decades under the constitution, but nowadays are almost unknown

3 Taxation

(a) Export import and tonnage duties

Among clauses of general application bearing on the taxing power are those forbidding a state (1) to deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, (2) to pass any law ' impairing the obligation of contracts", also the well known clauses prescribing (1) that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and (2) that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" The taxing power may no more be employed in violation of these blanket provisions than may any other power

(b) General constitutional provisions

Moreover, there are restrictions arising not from specific constitutional provisions, but from interpretations placed upon the inherent nature of our federal system One of these relates to federal property, which, to all intents and purposes is immune from state (and of course local) taxation Congress, it is true, in 1864 authorized the states to tax national bank stock and also the physical property belonging to national banks Such property, however, is in reality private rather than public, and nearly every effort of a state to tax real estate or other property belonging directly to the national government has met with defeat [15]

(c) Exemption of federal property

In deciding a case in 1873, the Supreme Court said [16]

(d) Immunity of interstate commerce

> It is of national importance that over the subject [interstate commerce] there should be but one regulating power, for if one state can directly tax persons or property passing through it or tax them indirectly by levying a tax upon their

[14] Art I § 10 cls 2 3 Ships as property may be taxed but not their tonnage or cubic ... merce and navigation

2 (1873)

transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed

Under this principle, a state may not tax the carrying of goods across its borders, or proceeds from securities sent outside a state to be sold, or indeed any *transactions* in interstate or foreign commerce whatsoever, although property (*e g*, *railroads*) employed in such commerce may be taxed in proportion to the amount or value located in a state, and "compensating" taxes on the *use* of goods purchased in a different state to evade sales taxes in the home state may be levied

(e) Exemption of federal instrumentalities

Until 1939 there would have been added to the foregoing a restriction preventing the states from taxing federal "instrumentalities" such as bonds and other securities (or the income therefrom), franchises granted by the federal government, and salaries of federal officials and employees On its part the federal government was considered equally debarred from taxing state officials salaries as well as income from state and municipal bonds, and other state "instrumentalities" Under force of the reasoning employed by Chief Justice Marshall in McCulloch v Maryland in 1819,[17] these reciprocal immunities long were regarded as flowing inevitably from the very nature of the federal system, and as being inviolable unless abrogated or curtailed by federal constitutional amendment Growing budgets and need for new sources of revenue—combined with the greatly increased numbers of people living on government salaries and the retreat of mounting sums of money into tax-exempt securities—gradually led, however within the past two or three decades, to a different view of the matter, and when, during his second term, President Franklin D Roosevelt urged Congress to wipe out all intergovernmental tax immunities enjoyed by salaries and by incomes from securities, he was successful in securing the Public Salary Tax Act of 1939,[18] giving effect to his recommendations relating to salaries, although not to income from securities Reversing a long line of earlier "reciprocal immunity" decisions the Supreme Court upheld the statute,[19] and the federal government has since been taxing state and local salaries, with the states similarly taxing federal salaries, if taxing incomes at all Income derived from federal bonds and other securities is, however, still exempt from state taxation with income from state and local securities reciprocally exempt from federal taxation

How much longer these surviving tax restraints will endure is problematical Repeated efforts of the Roosevelt Administration to bring them to an end proved unavailing But, with the taxation of salaries as an entering wedge, the exemption of income from securities appears foredoomed The issue will be forced in connection with federal taxation of state and local securities, at present strongly opposed by most state and local officials If and when such taxation becomes possible, however, restraint of the states from taxing federal

[17] 4 Wheaton 316 (1819)

[18] 53 *U S Stat at Large* 575 (1939)

[19] Graves v People of the State of New York *ex rel* O Keefe 306 U S 466 (1939) The point to the decision was *not* that national and state governments may tax each other, but only that the taxing by either of salaries paid by the other imposes no burden upon any *government* but merely one upon the persons who pay the tax

securities can, of course, no longer be maintained Seeking to stave off the threatened federal tax, state attorneys general have argued that it could legally be authorized only by constitutional amendment The language of the Supreme Court in sustaining reciprocal taxation of salaries clearly suggests, however, that similar taxation of income from securities could be authorized in the same way, *i e*, merely by act of Congress

4 Commerce

The clause of the constitution giving Congress authority to 'regulate commerce among the several states " is at once a fertile source of power for the national government and a sharp restriction upon the states[20] To be sure, over commerce that is strictly intrastate the several states have substantially complete control To come under this head, however, it must originate, end, and have its entire course in a single state If at any stage a transaction takes on an interstate aspect, it is subject to federal regulation from the moment it begins until it is completed—even though in some situations, *e g* interstate insurance, failure of Congress to act opens a way for the states to do so In exercising its police power, too, a state may impose regulations affecting interstate as well as intrastate commerce (*e g*, forbidding railroads to employ color-blind engineers on either local or through trains, or limiting the speed of trains within city limits) The object, however, must clearly be to promote public safety and welfare, with the effect upon interstate commerce purely incidental

5 Currency

One of the main advantages of union is a common currency system Hence the federal constitution gives the national government full control over the country's currency and forbids the states to coin money, to emit bills of credit, or to "make anything but gold and silver coin a tender in payment of debts "[21] Under their reserved powers, the states can charter banks, and numerous banking institutions so created exist beside and compete with national banks in all of the states Furthermore, the states can authorize these banks and banking associations to issue notes for circulation as currency, although not as legal tender In 1865, however, this latter power was stripped of all practical significance by an act of Congress laying taxes up to 10 per cent on such notes and thereby making it unprofitable to issue them The Supreme Court upheld the measure, and as a result, state bank currency has passed entirely out of existence

6 Contracts

Society exists and business is carried on by virtue of a network of human relations which find expression in agreements, or contracts, and little thought is required to show how insecure and otherwise difficult our everyday existence would be if these agreements could be disregarded with impunity It is not strange, therefore, that the framers of the national constitution put into that instrument a clause expressly forbidding the states to pass any law impairing the obligation of contracts,[22] *i e*, weakening their effect or making them more difficult to enforce Expecting business relationships to be con-

[20] See Chap 26 below, where one will be *impressed* with the progressive narrowing of state control because of judicial construction of the term "commerce" to include manufacturing, mining and other operations of production

[21] Art I § 10 cl 1

[22] Art. I § 10 cl 1

trolled by the state governments rather than by Congress, they imposed no corresponding restriction upon the national government, although in later days the courts have at least gone so far as to hold that the national government is no less obligated by its own contracts than are individuals

(a) Charters and franchises of private corporations

A contract may be defined as an agreement enforceable at law, and no state legislation which weakens the obligations arising from such an agreement is valid unless considerations of public health, safety, or morals demand it and compensation is rendered for the injury done Both the definition and the rule are however easier to state than to apply Ordinary agreements, executed in due legal form, and with either individuals or corporations as parties, *e g* to pay a debt, are obviously included But how about a charter granted by a state to a bank or a railroad company? Or an appointment to a public office? Or a license to practice medicine? These and many similar questions have been ruled upon in numerous judicial decisions, with results which must be indicated briefly In the Dartmouth College case, in 1819, the Supreme Court held that the charter of the college, granted by the English Crown was a contract which the state of New Hampshire, as represented by its legislature had no power either to revoke or to impair without the college s consent [23] This was tantamount to saying that franchises and charters issued to private corporations by public authorities, including state legislatures, were protected by the constitutional guarantee against ever being withdrawn or altered without consent of the holders, and corporations long tried to maintain that any withdrawal or curtailment of privileges once granted them was an illegal impairment of contract

If this contention could have been sustained, the results would have been serious But later the courts took the common sense view that charters and franchises are, after all only a species of property and as such can be modified, or even revoked with compensation rendered—or even without compensation when it can be shown that a corporation's business is "affected with a public interest," and that such public interest demands state intervention Furthermore, it is open to legislatures, when granting charters, to insert in them clauses making them revocable, or at least limiting their duration to a period of years, and usually this is now done Indeed, a state constitution may cover the matter blanketwise (as does that of Wisconsin) by making *all* acts of the legislature subject to alteration or repeal at any time Having taken precautions on some such lines, a state can amend or abrogate a charter or franchise at will, subject only to the provision of the Fourteenth Amendment—and this is a genuine limitation—that no person (individual or corporation) may be deprived of life, liberty, or property without due process of law, which means, among other things, that while a corporation may be extinguished, the tangible property interests of the stockholders cannot simply be wiped out

By judicial determination, the charters of *public* corporations, *e g*, cities

[23] Trustees of Dartmouth College *v* Woodward 4 Wheaton 518 (1819) The case arose out of an attempt by the state to take control of the college out of the hands of its trustees.

and towns, investing them with governmental powers are *not contracts* within the meaning of the "obligation" clause Such local units are merely agencies of the state maintained for purposes of practical convenience, and so far as the national constitution is concerned, the state legislature can rescind or amend their charters in any way at any time, or even extinguish the units themselves Various forms of agreement between a state and its citizens are construed also not to be contracts Thus a person appointed to a public office, even for a fixed term and at a specified salary, acquires no vested right to it, no contract is violated if the state subsequently abolishes the office outright Furthermore, a license issued by a state or by one of its political subdivisions, to engage in a vocation or profession, *e g* to practice medicine is not a contract, but only a grant of privilege which legally can be revoked at any time

(b) Other charters and agreements

As will be explained presently, the constitution makes it the duty of every state to extend the privileges and immunities attaching to its own citizenship to citizens of other states coming within its jurisdiction To this, the Fourteenth Amendment adds the provision that a state may not make or enforce any law abridging the "privileges and immunities of citizens of the United States" Originally designed primarily for the protection of the recently liberated Negroes against discriminative treatment under the laws of Southern states, this clause has caused the courts a good deal of trouble What are the privileges and immunities of citizens of the United States? Do they include all of the civil rights appertaining to citizenship in general under our system *e g*, freedom of speech freedom of religion, and the like? If so state guarantees of such rights are in effect swallowed up in federal guarantees, rights are almost completely nationalized, and state responsibilities in the area are of no very great importance Starting with decisions in the Slaughterhouse cases of 1873, the Supreme Court has refused to concede that the authors of the clause meant thus to transform the character of the federal system, and has held that the "privileges and immunities" contemplated are limited to such as not only are expressly conferred by the federal constitution, laws, and treaties, but manifestly are attributes of *national* citizenship alone, as distinguished from *state* citizenship—*e g*, the right to engage in interstate and foreign commerce, the right of free migration from place to place throughout the country, the right to become a citizen of any one of the states, the right of access to the federal courts and to all other agencies of the national government, the right to protection when traveling or living abroad, and the right to vote for members of Congress—and *not* the great bulk of ordinary rights derived from or recognized in state law, even as reenforced by the earlier amendments to the federal constitution In principle, privileges and immunities attaching specifically to United States citizens as such may not be infringed by any state Nearly all, however, are independently taken care of by the due process and equal protection clauses as now construed by the Supreme Court, leaving the "privileges and immunities" clause, as a distinct guarantee, less important than a reading of it in the constitutional text would suggest

7 Privileges and immunities of citizens of the United States

## OBLIGATIONS OF THE STATES IN THEIR RELATIONS WITH ONE ANOTHER

Every state is legally separate from every other state, and each has jurisdiction only within its own boundaries[24] Massachusetts cannot project her laws into Connecticut, an Illinois state judge cannot hold court in Indiana With the populations of all 48, however, perpetually commingling in pursuit of the various trades and professions, every state must constantly have dealings with other states, and endless confusion is averted only by the entire number accepting in common certain obligations toward one another Four such, indeed were imposed by the national constitution as originally adopted One—the duty to deliver up fugitive slaves escaping from one state into another—became obsolete when the Thirteenth Amendment abolished slavery The other three continue in effect, and pertain to (1) recognition of legal processes and acts, (2) interstate citizenship, and (3) rendition of persons accused of crime

1 Recognition of legal processes and acts

"Full faith and credit," says the constitution "shall be given in each state to the public acts, records, and judicial proceedings of every other state"[25] This does not mean—so the Supreme Court has held—that one state is obliged to aid in enforcing the penal laws of another state[26] But it does mean that records of deeds, wills, contracts mortgages, charters, court judgments, legislative enactments, and other legal papers or instruments of civil character must, when duly authenticated, be recognized and accepted at their face value in every other state precisely as in the state from which they emanated It means also that the authorities of Illinois (for example) must recognize and carry out the decisions of the courts of Michigan in civil cases, on presentation of certified copies of the relevant records, exactly as they would honor decisions of the courts of their own state Thus a will made in Illinois but probated in Michigan is just as good in the latter state as in the former no matter how widely the laws of the two states on the subject of wills may differ Or, to take another illustration A and B are residents of Detroit A brings suit against B and gets a judgment in the amount of $500 Without paying, B moves to Chicago, taking his property before it can be attached Under the "full faith and credit clause, A can go into a court in Illinois, and with simply the judgment of the Michigan court as evidence, obtain a decree against B for the amount of the judgment B may challenge the accuracy of the record, and he may demand a new trial on the ground that the Michigan court did not have jurisdiction But on no other grounds can he secure a reopening of the case An obligation—whether as debtor, partner, trustee, guardian, husband, or what not—cannot be evaded by the easy method of simply moving from one state into another

[24] Slight exceptions arise from occasional state laws permitting law-enforcement officers in "hot pursuit of an alleged offender to follow him across the border, arrest him and turn him over to the local police

[25] Art IV § 1

[26] Wisconsin v Pelican Insurance Company 127 U S 265 (1888) As will be pointed out presently a state may surrender an accused person to the state from which he has fled but it will not try him or enforce a penalty imposed upon him elsewhere

In a few areas, such as commercial transactions, state laws have attained a certain amount of uniformity [27] More commonly, however, they differ, and in every state the authorities must be prepared to extend 'full faith and credit' to papers properly issued and actions properly taken in other states, no matter how far out of line with the state's own regulations and practices As a rule, the principle operates almost automatically One subject of legislation, *however, gives a great deal of trouble, namely, divorce Marriage—at all* events if not of divorced persons—raises few difficulties, if contracted legally in a given state, it is usually accepted in all other states as valid, regardless of how different their marriage laws may be Divorce, however, is not so simple Not only do the laws differ sharply, but those of a few states, *e g*, Nevada, are notoriously lax, and while at one time the Supreme Court seemed to hold that under the 'full faith and credit" clause any divorce granted in a state must be recognized as valid by every other state, a decision of 1945 [28] opened a way for a state to withhold such recognition if in its opinion a divorce has been obtained under inadequate safeguards as to legal domicile (such as Nevada's requirement of only six weeks residence) or if due notice of the action was not served on the divorced partner, or if that partner was not represented in the divorce proceedings Divorce, however, is about the only matter of a civil nature on which full faith and credit" does not always operate [29]

**2 Interstate citizenship**

The framers of the national constitution rightly thought that no state should be allowed to discriminate in favor of its own citizens, against persons coming within its jurisdiction from other states To do so would imperil basic common rights and interfere with genuine national unity Hence it is provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states [30] In general this means that citizens of any state may move freely about the country and settle where they like, with the assurance that as newcomers they will not be subjected to discriminative taxation, that they will be permitted to carry on lawful occupations under the same conditions as older residents,[31] and that they will not be prevented from acquiring and using property or denied the equal protection of the laws, or refused access to the courts It does not mean that privileges of a political nature, *e g*, those of voting and holding office, must be extended immediately Nor is a state prevented from imposing quarantine or other *police regulations which will have* the effect of denying free ingress or egress or the right to bring property in or to take it out But such restrictions must be justified by provable public necessity, furthermore, they must be so framed as to fall alike upon the citizens of the given state and those of all

[27] See p 607 below

[28] Williams v North Carolina *325 U S 222 (1945)*

[29] The uncertainty of the Supreme Court itself on divorce is indicated by a decision of 1948 [illegible] earlier position Sherrer v Sherrer 334 U S [illegible] straighten out the confusion by enacting [illegible] would seem to lie in the direction of a [illegible]

[31] A brief period of residence before entering upon the practice of a given profession or the operation *of a given business may however be required.*

other states It is hardly necessary to add that a citizen of New York, migrating to Pennsylvania, does not carry with him the rights which he enjoyed in New York The point is rather that he becomes entitled to such rights as the citizens of Pennsylvania enjoy

3 Rendition

A third obligation resting upon a state is rendition of fugitives accused of crime 'A person charged in any state with treason, felony, or other crime,' says the constitution, 'who shall flee from justice, and be found in another state shall, on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime'[22] The object, of course, is to prevent criminals from "beating the law" by taking refuge on soil over which the states from which they have fled have no jurisdiction and on which they can execute no processes Rendition as practiced among the states is similar to, and was suggested by, extradition as carried on from very early times in the domain of international relations There are however important differences Nations are sovereign authorities and as such, they practice extradition only within rather rigid limits In the first place, they rarely or never will hand over a fugitive unless they have a reciprocal extradition agreement with the nation demanding him In the second place, they will not surrender him unless the crime of which he is accused is one of those enumerated for extradition purposes in the agreement Furthermore nations usually refuse to extradite their own citizens or subjects, and by almost universal usage, political offenders, e g, persons accused of participating in a rebellion, are exempted Finally, it has become an accepted rule that an extradited person cannot be tried for any offense other than that named in the warrant of extradition Rendition as practiced by the states, on the other hand, is provided for by the national constitution, not by interstate agreements, the offenses for which an accused person may be delivered up are broadly defined as treason, felony, and 'other crimes', states commonly give up their own citizens on proper demand, and there is no rule against trying a person so delivered up for an offense other than that with which he was charged when his delivery was requested

Procedure

The constitution says that the demand for the surrender of a fugitive from justice shall be made by the 'executive authority," i e, the governor, of the state from which the person fled, and an act of Congress provides that after the accused has been duly indicted the demand shall be addressed to the corresponding authority of the state in which the accused has been apprehended If, therefore, A kills a man in Ohio and flees into West Virginia and is there placed under arrest the governor of Ohio will send a requisition, accompanied by a certified copy of the indictment, to the governor of West Virginia asking the return of A so that he may be placed on trial in an Ohio court If the requisition is honored, the fugitive will be turned over to the Ohio police officer (commonly a sheriff) who has been dispatched to bring him back

There is no certainty, however, that the demand will be complied with To be sure, the constitution says plainly that the fugitive "shall be delivered

[22] Art. IV § 2 cl 2

up', and the act of Congress says, with equal directness, that it 'shall be the duty" of the executive authority to cause him to be handed over But despite such lucid and imperative language, many cases of refusal are on record The governor upon whom the demand is made may (perhaps after a hearing) decline to comply—on the ground that the person wanted has long lived in the refuge state as a law abiding citizen, or that the evidence against him is not sufficient to establish a presumption of guilt, or that he will not get a fair trial if returned, or that the penal laws of the state making the demand are unduly harsh[33] The actual reason may be something still different—perchance a mere whim, or even a personal grudge But in any case there is no way by which a refusal can be overcome, no court will issue a writ of mandamus to compel compliance, and the fugitive is safe as long as he remains where he is and the governor does not change his mind In the final analysis, the constitutional mandate is effective only in so far as chief executives choose to make it so Yet this does not mean that it is a dead letter, or even that it is commonly ignored, on the contrary it is obeyed in the great majority of instances, and when not obeyed usually is evaded for reasons that have substantial merit

Limitations

## DISPUTES BETWEEN STATES

Modes of settlement

The history of the Confederation was filled with controversies between states regarding boundaries, commercial regulations, and other matters, and the framers of the constitution were not so naive as to suppose that under the new plan of government the members of the Union would always live in perfect accord Among sovereign nations, disputes have traditionally been settled by (1) direct agreements reached through negotiation, (2) arbitration undertaken by some neutral ruler or similar agency, (3) adjudication in an international court, or (4) in the last resort, war The states of the Union are not supposed to make war on one another—although they did so in 1861-65 They may, and do, reach agreements through direct negotiation But the method of settlement chiefly contemplated by the constitution's authors was that of judicial determination, and in pursuance of this intent, the judicial power of the United States is extended to all 'controversies between two or more states,' with the further provision that in all cases in which a state is a party (regardless of the identity of the opposing party) the Supreme Court shall have original jurisdiction[34] The road to amicable adjustment of interstate differences by regular judicial process thus is always open, and many troublesome disputes relating to boundaries, water diversions, fishing rights, and other matters have been cleared up by resorting to it[35]

... of New Jersey persistently ... well known book ... refuge state until

[35] Down to 1940 some 80 suits were brought by one state aga st another in the Supreme Court with every state except Maine e ther plaintiff or defendant in at least one

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CHAPTER 5

# Our Changing Federalism and the Problem of Centralization

The circumstances under which the United States became a nation pre destined it to federalism, but the federalism that we have today is very different from that with which we started In 160 years, we have advanced from the position of a small and isolated nation with a simple agricultural economy to that of the most highly industrialized and probably most powerful of the great nations of the world, and as we have moved from milepost to milepost, our political, economic, and social institutions, responding to changing conditions and needs, have cut new channels and developed new patterns

"The cardinal question of our constitutional system

Profoundly affected at every stage have been the relations between nation and states In the conventions which made and ratified the constitution, this problem overshadowed all others, no sooner was the new government in operation than it again came to the fore, in some periods more than in others, but always in significant degree, politics legislation, judicial decisions, and administrative procedures revolved around it as our history unfolded in the nineteenth and twentieth centuries, and never since the Civil War has it stirred greater interest or stronger feeling than in the two decades since the launching of President Roosevelt's centralizing New Deal "The question of the relation of the states to the federal government," observed Woodrow Wilson 45 years ago, 'is the cardinal question of our constitutional system It cannot be settled by the opinion of any one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question' [1] In the preceding two chapters, this relationship has been touched upon chiefly in terms of formal constitutional patterns Even more significant, however, is the way in which it has actually developed over the years, and to this we now turn

## THE GROWTH OF NATIONAL POWER

A major development

Seeking to allay fears about what would happen to the states if the proposed constitution were adopted, Hamilton in 1788 predicted that it "would always be far more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon the

[1] *Constitutional Government in the United States* (New York 1908) 173

state authorities' ,[2] and for a time this opinion was widely shared Later experience, nevertheless, has been quite to the contrary With the national economy steadily expanding governments on all levels have grown in powers and functions [3] But most significant has been the rise of the national government to its present predominant position

Contributing factors

1 Economic and social changes

To this development many factors have contributed Not to be overlooked at the outset is the physical, economic, and social setting the expansion of territory, the growth of population, the increasing complexity of economic and social organization When people lived mostly on farms, in villages, and in small towns, along the Atlantic seaboard, their interests were *largely local and most needs for government on any higher level were met* by the states Eventually, however, and particularly after the Civil War, a group of more or less isolated and self-sufficient states became a unified and expansive nation, with matters more and more requiring management on the national level The era of big business" dawned Commerce, transportation, communication, linked the country from coast to coast So did corporations, holding companies, labor unions States tried to regulate and control, but things got out of hand People wanted services that states could not—or did not—provide Wars came, and only the nation could act Depressions came, and the states could but partially meet the problems raised And step by step—significantly, too, with general backing of public sentiment—the government at Washington took over Many persons did not like what was happening But there was little that they could do about it By building a big, populous country in an age of swift technological advance, Americans made big centralized government both necessary and inevitable

2 Constitutional interpretation—the doctrine of implied powers

As observed elsewhere, the principal present power of the national government arising from formal constitutional amendment is that of taxing personal and corporate incomes, and to appreciate the importance of this power, one has only to consider what the government s position would be, in the existing state of national and world affairs, if such means of obtaining the greater part of its revenue were lacking Outside of this, however, expanding powers have accrued mainly from constitutional interpretation, with the final word significantly spoken by authorities of the national government itself And here the cardinal factor has been the discovery and use of the doctrine of implied powers—a matter so momentous that it will be appropriate to retrace our steps briefly to see how the doctrine first took form

(a) The rise of a great issue

Careful phrasing of the constitution did not prevent—no linguistic niceties could have prevented—differences of opinion as to the limits of power of both the national and state governments, and lively controversies arose before the new system had been in operation a year In 1790, Hamilton, as secretary of the treasury, proposed the establishment of a national bank People who considered that centralization already had been carried far enough at once objected that the constitution, in enumerating the powers of Congress, said

[2] *The Federalist* No xvii (Lodge s ed ) 98
[3] Except only at the lowest levels where the township for example has lost importance and in some places disappeared

nothing about a bank, they could show, indeed that its au… erately refused to give Congress even limited power to creat… Hamilton and others who supported his project replied that … stitution truly enough did *not* authorize Congress in so many … a bank the power to do so could easily be deduced *from* ce… authority about which there could be no question[4] This view … the bank was established Opinion on the matter, however, … reflecting honest differences of interpretation but rooted al… considerations of *personal* interest and political strategy—con… and from this beginning the issue of implied powers broade… became the foremost one (except that of secession for a dec… the entire constitutional history of the country

Led by Jefferson the strict constructionists argued that th… ernment had *no* powers except such as were expressly confe… the constitution, or at most such as could be shown to b… involved in the exercise of these delegated powers To take … urged the Virginian beyond the boundaries specially draw… powers of Congress by the Tenth Amendment is to take … boundless field of power no longer susceptible of any defin… other *hand* the loose or broad constructionists such as Ham… that the national *government* had all powers which could b… interpretation be regarded as implied in *the* letter of the grant … also that it had a right to choose the *manner* and means o… functions, even though involving the employment of agencie… *indispensable* for its purposes

On … rely legal grounds Jefferson s argument was plau… … the doctrine of implied …

—often at the expense … states The logic of practical necessity lay … view If the national government perennially confronted … and unforeseen problems was to attain the ends for which … it must without fail have the benefit of all authority that … deduced from the grants made to it otherwise it would … where inaction would be ruinous This eventually was … grudgingly, by the Jeffersonians themselves and after they … the government in 1801 it was not long before they … implied powers almost as freely as had *their* Federalist … basis for example could Louisiana have *been annexed* in … laid on foreign trade in 1807

In the course of time the question reached the Supre…

… and other aspects of …

(d) Chief Justice Marshall's historic pronouncement

memorable series of nationalizing decisions between 1809 and 1835 that tribunal—while acknowledging limits beyond which powers could not properly be inferred—lent the doctrine the full weight of its authority Classic expression was given the Court's views by Chief Justice Marshall in the case of McCulloch v Maryland, in 1819, as follows [5]

> This government is acknowledged by all to be one of enumerated powers The principle that it can exercise only the powers granted to it is now universally admitted But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist The powers of the government are limited, and its powers are not to be transcended But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional

The principles here laid down gained general acceptance and are today firmly embedded in our constitutional law Not only so, but, as a result of social and economic changes, of wartime and depression crises, and of diminishing popular aversion to government regulation, the implied-powers concept is nowadays applied in directions and in situations of which Marshall and his black-robed colleagues never dreamed

3 Legislation and judicial action

With implied powers as a mighty lever, national controls have been forced to ever-mounting heights by legislation backed by judicial action In major fields like finance, commerce, agriculture, labor, defense, and social security, Congress often has started with admittedly slender phrases in the constitution's text or indeed none of direct application at all, and, spinning a web of inference and deduction, has projected an implied regulating authority into the deepest recesses where the states live and move and have their being, and the courts have followed, hearing protests, weighing powers asserted, and usually, although of course not invariably, giving the stamp of approval, and perchance of finality, to newly sketched federal-state frontiers

Of course it is not to be inferred that in all this the federal government has been building itself up simply by taking things away from the states Many of the great powers exercised—regulating interstate and foreign commerce, waging war, and the like—never belonged to the states at all, in any event after 1789 Others, *e g*, the taxing and spending powers, have from the first belonged to nation and states alike In other words, the national government has, to quite an extent, developed its present mighty volume of authority entirely within its own sphere, on lines plainly laid down in the constitution or implied therein, and without preventing the states, *in their spheres,* and by equal constitutional right, from similarly expanding their own powers and controls And the present disposition of the Supreme Court is to decide disputed constitutional questions in such ways as to leave a maximum of power

[5] 4 Wheaton 316

in the hands of *both* the federal government and the states In scores of instances, nevertheless, a main or incidental effect of national legislation and judicial action has been, if not to 'encroach' on the states in the somewhat invidious meaning of Hamilton's term, at any rate to curtail jurisdictions, withdraw powers, and otherwise tip the traditional national state balance in the federal government's favor

4 National state cooperation

Still another factor in the growth of national power is federal state co operation The constitution itself contemplates such reciprocal activity, an increasing sense of national unity promotes it, and often it is practically necessitated by the advantages of country wide standardization in fields in which it nevertheless would be undesirable, perhaps even unconstitutional, to introduce such uniformity by legislative fiat Cooperation, too, takes many forms Sometimes it is purely voluntary, as when the federal government carries on research in areas like agriculture industry, and education, making the results available to the states, but with the latter free to utilize them as much or as little as they like Sometimes it involves more or less formal requests from Washington which the states endeavor to meet in deference to a general public interest, as when they are asked to do what they can to relieve unemployment, deal with an epidemic, administer selective service, promote civilian defense, or assist with a rationing program Sometimes it takes the form of enabling the states to enact and enforce laws which they otherwise would have no power to enact at all, as when the Webb-Kenyon Act of 1913 (now reenforced by the Twenty first Amendment) forbade the transportation of intoxicating liquor into any "dry" state, or when the Ashhurst Sumners Act of 1935 banned the transportation of prison-made goods in violation of state law, or when the Connally 'Hot Oil' Act of the same year prohibited the shipment of oil in interstate commerce in excess of quotas fixed by the states Sometimes federal officials are made directly responsible along with state officials for enforcing a state law, as when the two are associated in preventing interstate transportation of game killed in violation of such a law Many times, and most significantly, too, cooperation takes the form of financial grants to the states, *i e*, 'federal aid," for the promotion of given objectives or purposes

On their part, the states reciprocate in many ways Their appropriate officers conduct federal as well as state and local elections Their judges naturalize aliens, even though under federal law Their authorities help administer other federal laws like the Pure Food and Drugs Act, the Wages and Hours Act, and the Social Security Act State and local police cooperate with federal law-enforcement officers in arresting counterfeiters and other violators of federal law And if federal money is poured into the states in aid of various services, the states themselves almost always must come forward with equal, or at any rate substantial, amounts for the given undertakings To the old Hamiltonian notion of *nation and* states as necessarily competitive and, at least potentially, always in conflict, has succeeded—even in the thinking of the legally-minded Supreme Court—a concept of nation and state as rooted in the same American traditions, possessing more interests in common than in conflict, and capable of friendly collaboration for the general good, and the consequences,

raising some new problems, have been generally advantageous The point to be emphasized here, however, is the tendency of every form of national-state collaboration to carry federal influence (often amounting to substantial control) ever more deeply into the realm of state affairs Certainly this is an extremely significant result of the "federal aid' now to be touched upon

## FEDERAL FINANCING OF STATE AND LOCAL ACTIVITIES

Back ground

In the federal constitution, the national government is given taxing, borrowing and spending powers ample for operating its own financial system, the states are left with reserved powers of similar nature, and no direct provision is made for inter level financial collaboration For more than 100 years, the arrangement worked reasonably well, with little competition or overlapping After 1900, however difficulties began developing Governments on all levels felt increasing pressure for public services and saw expenditures rapidly mounting Endowed with superior taxing and borrowing powers, and better equipped for financial management, the national government had means of meeting the situation Forced by tradition and practical circumstances to rely mainly on general property taxes (whose possibilities are large but not inexhaustible) the states were less fortunately situated, and in time they and their subdivisions were, in effect, faced with the alternative of surrendering to the national government functions which they no longer could support or retaining them but accepting, and even soliciting, federal assistance for carrying them on

With public demands continuing to multiply and costs to rise, it still seemed of paramount importance, if the federal system was to survive, to keep states and localities responsible even for activities which they could not fully support, and the upshot was the rise—slow at first but later rapid—of a working nation-state relationship under which federal money is combined with state money for carrying on specified state activities, though always with the hand that gives extended also to some extent for regulating the services supported Joint financing, in this quasi-contractual form nowadays looms large in the budgets of both nation and states, and operates, too, as a potent centralizing force Constitutional power for so bridging the nation-state financial chasm is supplied chiefly by the taxation for general welfare" clause

Earlier grants of land and money

Grants by the federal government to the states are no novelty in our time Beginning with Ohio in 1802, Congress made a regular practice of bestowing on newly admitted states public land within their boundaries equivalent to one section in every township to be used for the development of permanent school funds—in fact, two sections after 1848, and even four in the cases of Utah, Arizona, and New Mexico In the famous Land Grant College [Morrill] Act of 1862, it set aside still more land for the benefit of the states, specifying that the proceeds should be used by each in endowing and maintaining one or more colleges devoted primarily, although not exclusively, to instruction in 'such branches of learning as are related to agriculture and the mechanic arts", and funds derived from this source help support our upwards of 70

"land-grant" colleges and universities today Not only land, but also money (in periods of surplus revenues), was bestowed in earlier times, and not only for education, but likewise for roads, canals, and other 'internal improvements"

The later pattern of conditional grants

In later decades, a new form of *conditional* grant gained large fiscal, administrative, and social importance Referred to commonly as a "grant in aid" its cardinal principle is that Congress will appropriate money for the promotion of a specified service or activity carried on by the states, apportioning the sum for any given purpose among the whole number of states according to population, need, or some other formula but permitting a state to share in the subvention only, as a rule, on four conditions (1) that the state shall spend the federal money only for the exact purpose indicated and under whatever conditions may have been laid down, (2) that the state itself, or its subdivisions, shall make concurrent appropriations for the purpose in hand (often in amounts at least equal to its share of the federal grant, but sometimes more, sometimes less and occasionally none at all), (3) that the state shall create, or at all events maintain a suitable administrative agency—highway commission, extension director, vocational education board, or whatever it may be—with which the federal government can deal in relation to the activity to be carried on, and (4) that, in return for the assistance received, the state shall recognize the federal government s right (with suitable regard for local conditions) to approve plans and policies interpose regulations, fix minimum standards, and inspect results—for almost automatically "control follows the dollar" [6] Often, of course it will be necessary for states to enact new legislation in order to qualify for sharing in a given grant, almost always, administrative machinery will have to be reconstructed so as to open a way for supervision by national officers over activities that previously—if undertaken at all—were entirely in the state s own hands

Ostensibly, no compulsion is exercised A state may, if it likes, decline to meet the conditions imposed, in which case it simply does not participate in the federal subsidy, and this voluntary aspect of the plan has been of great help to the courts in getting around the constitutional difficulties which some of the legislation, dealing with matters far out on the rim of federal authority, presents Compliance by the states is, however, less voluntary than appears For the federal funds represent the proceeds of taxes paid by the people of the entire country, and if any state refuses to go into a given arrangement, it thereby cuts itself off from the benefits which its own taxpayers are helping to bestow on the states that participate Naturally, it will be reluctant to do this, and the same considerations that initially induce a state to accept its share of a grant commonly impel it to live up to the specifications imposed and standards required rather than run the risk of having its subvention withheld Practically all existing forms of grants-in-aid are shared in by all, or substantially all, of the states

[6] In practice federal control is carried much farther in connection with some types of grants notably highways and militia than in the case of others e.g., vocational education and agricultural experiment stations.

Mounting totals

Prior to the depression of the thirties, federal grants-in-aid, although significant, were on a relatively modest scale In 1920, they aggregated only $77 1 million, in 1930, approximately $135 0 million By 1937, however, the states, as a group, were deriving more of their revenue from this source than from any other except gasoline taxes and general sales taxes, and in 1939 grants of the kind were made for no fewer than 21 different state or local purposes, while the total outlay mounted to $582 5 million, an increase of more than 300 per cent in 10 years Even this huge figure, however, was destined to be exceeded later In 1941—the last year before war disrupted activities like highway construction—it rose to $851 million, in 1944, with war in progress, it fell to $649 million, but in 1947, with more normal conditions restored, it shot up to $1 1 billion, in 1948 to $1 6 billion, in 1949 to $1 8 billion, and in 1950 to $2 2 billion

Fields of operation

Most services and activities to which the grant-in-aid principle has been extended are necessarily touched upon at other points in this book, and hence only a summary is called for here

1 Under a Federal-Aid Road Act of 1916, Congress began subsidizing the states for highway building and maintenance, every state agreed to match whatever federal grants were made, and under an authorization of 1944, federal outlays rose to $500 million a year

2 Under the Social Security Act of 1935, old age and survivors' insurance is a purely federal enterprise and, except for a federal contribution to costs of administration, unemployment compensation is financed from payroll taxes on employers and employees, but practically all other services provided for—old age assistance, assistance for crippled and other needy children, help for the blind, vocational education and rehabilitation—are operated with moneys supplied (equally or otherwise) by both nation and states

3 Since 1933, state employment offices (taken over by the federal government in 1942, but restored to the states four years later) have been assisted by non-matched national grants

4 At certain points, *e g*, forest-fire protection since 1924, the cost of preserving natural resources is shared

5 In all of the states, agricultural experiment and extension work is carried on through agencies receiving extensive federal support

6 For a number of years, sizable grants have been made to states willing to cooperate in mental health, cancer, tuberculosis, venereal disease, and other health programs, including hospital construction

7. An arrangement not commonly referred to as a grant-in-aid situation, yet clearly embodying the principle, is the federal government's rôle in connection with the militia of the states Subsidized by Congress from as far back as 1808, the militia organized as the National Guard now derives four-fifths of its financial support from that source, has become an integral part of the war machine of the nation, and in various respects is rigorously federally-controlled It nevertheless continues to serve the states and from the financial point of view is merely federally-aided [7]

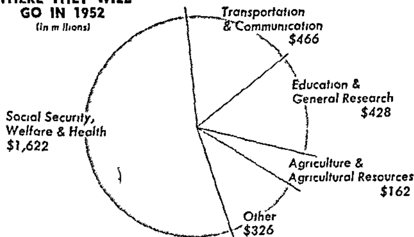
[7] In addition to the foregoing list, there are grants for the construction and development of airports, lunches for school children (furnished from surplus foodstuffs held by the government), aid for the needy disabled, eradication or control of plant and animal pests and diseases, abatement of water pollution flood control, reforestation, and still other purposes In all, 40-odd grant programs are now (1952) in operation

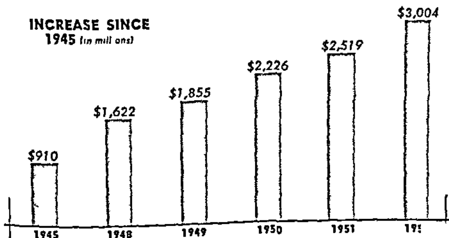
Strongly supported proposals, too, would carry the system into the two major fields of (1) elementary and secondary education and (2) general public health This matter, however, is considered in a later chapter (see pp 472-474 below)

With the development of the grant in aid system have come new relationships not only between the federal government and the states, but between that government and subdivisions of states such as counties and cities There was a time when the government at Washington was supposed to have, and commonly did have, virtually no direct administrative dealings with local governments—outside, at all events, of the District of Columbia and the territories, inter-level relations of such governments reached upwards only to the states in which they were located In the first instance, it was mainly the depression of the thirties that brought a different situation Problems of relief and unemployment overtaxing the capacities of the states had to be taken over by

Federal grants to local authorities

**FEDERAL GRANTS-IN-AID TO STATE AND LOCAL GOVERNMENTS**



the federal government, and in handling them that government often simply by-passed the states, reaching down to local
directly
sewerage, public buildings; federal money w... available to municipal housing authorities, insolvent cities were given means of reaching agreements with their creditors in federal bankruptcy courts With the return of better economic conditions
these activities came to an end
had

that federal money granted
to be expended locally, is channeled directly to local authorities, without passing through state hands In states that have so authorized, for example, federal funds for old age assistance, aid for needy children, and aid for the blind go directly to the counties In other instances, too, the states are by-passed even more completely In making and supervising grants for airport development under the Federal Airport Act of 1946, the Civil Aeronautics Administration deals only with cities and other local units unless a given state requires the funds to be channeled through its own authorities Through the soil conservation service of the Department of Agriculture, the federal government also directly assists local soil-conservation districts in their soil-conservation and erosion-prevention activities And county agricultural agents, although selected at state agricultural colleges and serving the farmers of counties, are supported partly by the federal government, to which naturally they have some responsibility

Indeed whenever a new form of grant-in-aid is introduced, a question that has to be settled is whether the federal funds shall be paid in lump sums to the states to be distributed, or instead shall be paid directly to localities In so far as new federal-local relations (financial or otherwise) are so conducted as to "short-circuit" the states, the traditional federal-state balance tends to be further weighted in the federal government's favor, although from the state point of view the situation is safeguarded by local governments usually being required to have the consent of the proper agencies of their state before entering into relationships involving any direct obligation
or any possible infringement of state

Criticism of the grant in aid system

Rapid exten
givings, a ... as that

1 Under it, the national government practices
effect buys the right of
the state's reserved pow

2 The system coer ... overloading themselves with obligations and ex

3 It tempts them to spend disproportionally on activities for which they can get aid, while slighting others

4 It encourages manipulation and vote-trading in Congress for special favors for particular causes or interests

5 It tends to create masses of voters ... erprises, thereby assuring the

6 It engenders the habit of relying on doles encourages the demoralizing notion that the government at Washington owes every state activity and interest some measure of support and if persisted in means the gradual breakdown of local self government in America

7 Federal aid is a misnomer since all that the federal government does is to take money from the people of the states in the form of taxes put it in the general fund draw it out again and redistribute it in proportions not always easy to justify

8 Where demonstrated need is the basis of distribution richer states—in which opposition to the policy has largely centered—are made to bear most of the burden and progressive states are penalized for the benefit of more backward ones

9 With their revenues substantially increased in later years states now have less excuse than in depression time for seeking federal hand-outs and would be glad to forego many of them if relieved of the federal taxation that provides them

10 If grants are to be made at all they might better be (as are corresponding grants in Canada and Australia) block or lump sum rather than functional grants—to be spent by the states entirely at their own discretion

Counter arguments

To all this there is of course a rebuttal running somewhat as follows

1 The system encourages the states to undertake needed social services which many of them otherwise would neglect or feel that they could not afford

2 It enables minimum national standards to be set up in fields of social and economic regulation in which the people of the entire country have a vital interest

3 It divides burdens which states often are unable to bear alone qu te justifi ably requiring the richer states to help the poorer ones improve conditions in which all have a common concern

4 By imposing reciprocal obligations it checks the scramble for public money too often occurring when such money is bestowed without local responsibilities imposed as for example in making river and harbor appropriations

Legally at least no state is ob[illegible]

system unless it desires to do so

8 In the final analysis the grant in aid system is the only alternative to an enormous expansion of direct federal control on lines that would be still more damaging to state power and pride—although to this it is replied that if the na tional government would relinquish some of its sources of revenue to the states they would be able to take care of the aided services for themselves

Some conclusions

Whatever the merits of the foregoing conflicting views certain over all facts are clear (1) By and large the grant in aid system developed in response to

(a) the desirability of meeting nation wide problems on a nation wide basis according to nation wide standards and (b) the national government s readier access to funds (2) The system is here to stay and not only so but probably will expand until it covers practically all of the basic services which the Amer ican people have been encouraged to expect of their governments (3) Various objections to the device still have weight with a good many people and every

extension has been and will be vigorously resisted Yet, much former opposition has melted away Both political parties are committed to the principle, the Supreme Court has removed all constitutional obstacles, [8] and so far as one can see there is no limit to the lengths to which grants may in future be carried except only the resources of the United States Treasury (4) This being true, more attention should henceforth be given to developing a general, over-all grant-in-aid policy Earlier forms of assistance were aimed at meeting particular and more or less isolated needs, with little pretense to planning With joint financing now, however, profoundly affecting budgets on both national and state levels, and with federal inspectors and supervisors intermingling everywhere with state and local officials, the country needs to step back, take a long look at what has happened, compute the consequences, and, with big decisions still to be made, prepare (as urged in 1949 by the Hoover Commission on Organization of the Executive Branch) to make them with more regard for considered principle and policy than sometimes in the past

## THE GENERAL PROBLEM OF CENTRALIZATION

From the beginning a primary question in this country has been that of the extent to which, under our federal system, the national government should be encouraged or permitted to build up powers and controls at the expense of the states—in other words, the question of "centralization" An old issue, assuredly, but also ever new, and no informed person needs to be told that fierce fires of controversy have raged around it in the last three decades of rapidly expanding federal action particularly in the days of both "New Deal" and "Fair Deal"

Criticism of the present trend

On the one hand, it is contended that

1 The only feasible plan for a land of continental dimensions and a people of vast numbers and divergencies is one—such as the makers of our constitution had in mind—leaving wide scope for state and local management of domestic affairs, with centralized uniform, national control kept at a minimum

2 Even if the Congress has a constitutional right to extend its regulating activities in certain of the present and proposed directions, it is not wise or even safe, for it to insist upon going farther than it already has gone especially in the wide sphere of the police power, once supposed to be occupied mainly or entirely by the states

3 The national government already has become overgrown, top heavy unwieldy with the people in danger of finding themselves hopelessly weighed down with a vast, professionalized federal bureaucracy not too careful about the ways of democracy

4 In many large fields the state governments still are the more natural and efficient agencies of control, because closer to the problems involved and the people concerned

5 If permitted wide regulatory authority, the states, as "experiment stations," can usefully test various policies and procedures and thus enrich the general national experience

[8] Massachusetts v Mellon and Frothingham v Mellon 262 U S 447 (1923) in effect sustaining the Federal Child Hygiene [Sheppard Towner] Act of 1921 and by inference the grant in aid system generally also cases cited below (p 486, note 16) sustaining the Social Security Act.

6 In seeking to enforce uniform standards through an ever widening network of federal law, backed by steadily expanding federal administrative machinery, the national government is strangling the states and reducing them to mere local areas charged only with the neat and humble care of detail in obedience to a nationally determined policy "

In opposition to all this, it is argued that

Counter-arguments

1 Time, inventions, and other forces have so thoroughly nationalized the United States that most fundamental social and economic interests no longer are local but instead cut across state and sectional boundaries and are of common concern to the entire country

2 Along with this great change of conditions has gone a corresponding change of political ideas, so that people no longer expect or desire the state or regional autonomy cherished in earlier and simpler days but on the contrary, are prepared to see the legalistic *competitive* federalism of the past give way increasingly to the more flexible *cooperative* federalism of the future

3 Speaking generally, the states have not been so efficient as to have demon strate[illegible]

4 [illegible] are to be met effect[illegible] no use to say that that government is unfitted to take on more responsibilities, the proper course being, rather, to improve it so as to remedy the deficiency if it exists

Some broad conclusions

Here again, out of a wealth of *ex parte* and often emotional, argument arise certain conclusions The first is that the subject is not one upon which to dogmatize The proper attitude is not a generalized condemnation or a generalized approbation, but willingness to consider each proposed exten sion of national activity on its own merits A second point is that centralization and decentralization are not mutually exclusive principles, only one of which can be adhered to at a given time Large business establishments have found that efficiency requires uniformity and concentration in certain of their operations and quite the reverse in others So it is with governments A high degree of centralization in one field is not incompatible with no centralization at all in other fields In the third place, augmentation of national authority and action is, on general principles, inevitable, however one may feel about it It is the universal experience, once national unity has been attained, and the device of federalism can no more prevent it in the United States than in Switzerland or other countries that started with highly decentralized systems Let social and economic interests develop to a point where they no longer are bounded by state lines, but are of regional or national concern, and any attempt to keep up a monopoly of state regulation not only is hopeless, but, if persisted in, is certain to precipitate damaging conflict between state power and national power "The outcome of such conflict can never be long in doubt The greater will prevail over the lesser "

The popular basis

Finally, the trend toward big, centralized government has for a good while been supported, and even stimulated, by public opinion In five successive national elections (1932-48), the people have rewarded with victory the party most conspicuously associated with it. Vocal hostility to the centra' tendencies inherent in the "New" and ' Fair" Deals, is, it is true, often

heard, nowhere more than in the Democratic South with its states' rights traditions Yet no national political party is pledged to any very significant curtailment of federal powers and functions, or could hope to win much favor by espousing such a policy Like all other countries in which free government survives the United States, in our time, has shifted leftward People expect, and are encouraged to expect, greater economic "security and larger social services through public action And the government to which they have learned to look chiefly for direct benefits, or at any rate for benefits federally assisted, is that operating from Washington "Centralization" may have unpleasant connotations, but the people want what it brings

## THE OUTLOOK FOR THE STATES

Some serious charges

What, then of the states? Are they to be completely overborne by the advancing supremacy of the national government? Have they become so enamored of federal aid as to have lost their constitutional vigor and self-respect? Notwithstanding much vitality displayed during World War II, there are those who consider them definitely in decline, indeed, there are those who look hopefully to the day when the 'waste and confusion" of 48 separate state governments will be no more Charges are brought that, as constituted geographically, the states, speaking generally, do not correspond to economic or social unities, that provincial viewpoints of their populations and restrictive clauses in their constitutions frequently prevent them from cooperating for the public well-being, either with one another or with the national government, that sometimes they fail to deal vigorously and effectively with even their purely internal affairs And remedies proposed include such bold suggestions as (1) redrawing the map of the country so as to bring state boundaries into better accord with the present distribution of population, and with other social and economic conditions, (2) displacing the states, largely or wholly, with a smaller number of political divisions (perhaps nine or ten) laid out to correspond to socio-economic *regions,* and (3) giving the national government not only power to regulate *all* commerce, protect *all* natural resources, and the like, but undivided authority to legislate on health, safety, morals, and the general welfare, even though such "police power" is now the states' most distinctive feature and their principal reason for existence

Proposed remedies

The states not yet "finished"

There is truth in all of the charges listed above, perhaps something, too, can be said for all of the proposals enumerated On the whole, nevertheless, it is safe to assume that, however much farther their position may be undermined in certain directions by constitutional amendment and interpretation, by legislation and practice, and by changes in our economic system and international position making activities in an ever-widening field matters of concern to the federal government, the states will persist, not merely as geographical and political units, but as custodians of the greater part of their present powers and functions, together with new ones springing from ever-continuing development of technology, economic relationships, and social policies Hardly anything short of sheer dictatorship would enable the map of this country to

be redrawn as was that of Germany by ruthless Nazi officials after 1933 *Not only* so, but even after their harrowing experiences of the depression decade, the states have grounds for facing the future with confidence Their fundamental position in the constitutional system is secure as long as they do not themselves choose to relinquish it, the United States, reaffirmed the Supreme Court in 1936 [9] (employing the historic language of Chief Justice Chase), still is 'an indestructible union of indestructible states"

As observed elsewhere, the states nowadays carry on more activities spend more money, have more employees, and do more for their people than at any *time* in the past Even if they could be abolished, something (as all regionalists concede) would have to be put in their place—something that would perform at least the three great functions of exercising the police power, controlling local government, and making and administering civil and criminal law As semi-autonomous political units regulating the activities and relations of their citizens by laws of their own devising they unquestionably have lost ground, in larger matters of social and economic control, they probably will continue to lose As areas of administration, however, they have gained, and even though, as seems likely, they in future may function more and more, *administratively*, as collaborators with, and even as agents of, the national government, they need not on that account suffer loss of genuine vitality—even if there were not always going to be plenty of things for them to initiate and do independently

Some ways of strengthening their position

There are ways, too, in which they can definitely improve their present position One of these is continuing the intelligent and vigorous overhauling of governmental machinery and procedures which here and there has been going on encouragingly in later years Notwithstanding a good record during World War II, prestige and power have been lost, over the decades because (to no small extent) of failure to deal effectively with difficult problems thrust upon state governments by the exigencies of the times Of course, a good deal of what has happened has flowed from circumstances beyond the states' control Nevertheless, by setting their houses in order—regenerating their legislatures, toning up their civil services, improving their administrative methods, modernizing their county and other rural local governments, and utilizing the newer techniques of long term planning—they still may, to a considerable degree, stem the tide that has been running against them The best way to preserve state power is to increase state competence

1 Overhauling their own governments

A second promising line of defense is cooperative action tending to lessen the need for federal regulative interference One particularly challenging aspect of this matter in recent years has been the removal of various barriers to interstate business and trade erected largely during the depression, and injurious not only to the free life of a united nation but to the long term interests of the states themselves, and it is gratifying to observe that, although the problem is far from solved, much progress toward eliminating such restrictions has been made By enacting uniform legislation on business practices

2 Developing interstate cooperation

[9] In United States v Butler (297 U S 1) invalidating the first Agricultural Adjustment

and other appropriate subjects, states may not only promote the convenience and well-being of their people but counteract arguments for national, or perchance regional, regulation By reciprocally extending rights and privileges to one another's citizens, as for example in the practice of the professions, they may obviate jealousies and promote general harmony In the domain of taxation, in particular, they may serve the ends of justice by mutually refraining from imposing double and triple burdens Information may be exchanged, common problems discussed, joint investigations carried on, compacts entered into, voluntary interstate organizations maintained for a wide variety of purposes

Newer cooperative agencies

Many new instrumentalities have come into existence to facilitate cooperation of this nature In 1925, an American Legislators' Association was established, linking up the now 7,633 members of state legislatures Ten years later, this organization was broadened to form a Council of State Governments, with administration as well as legislation included in its province, and at the present time this Council has for objectives not only promoting interstate compacts, encouraging enactment of uniform laws, and advancing other forms of interstate cooperation in mutually beneficial ways, but also serving the states as a clearing house of research and information for improving state legislative and administrative practices Different types of state executive and administrative officials—governors, secretaries of state, attorneys general, auditors, comptrollers, and treasurers, and others—have formed similar nation wide organizations, with the Council of State Governments serving as their common secretariat [10] Interstate commissions, too, on social security, crime, and conflicting taxation have been set up, and a consciousness of common interest and reciprocal obligations has been developed among state legislative and administrative groups the country over All told—through these many agencies and in other ways—the chances for friendly and intelligent solution of problems transcending state lines have been considerably improved, and in so far as matters that otherwise the national government would be tempted or compelled to take over are cared for through such channels of interstate comity and cooperation, the outlook for the states themselves will have been brightened

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[10] All of these together with associations of many local officials and agencies have head quarters in a building located at 1313 East 60th St, Chicago, with, in some cases branch offices in Washington D C, and other cities

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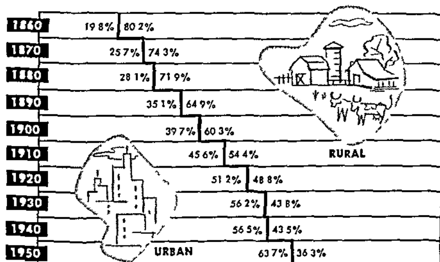
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cities, and, although steadily dwindling rural predominance continued through the first decade of the present century During a generation and a half of great industrial expansion, however, the population of towns and cities increased far faster than that of rural areas—at an average rate, indeed, of 33 per cent in the period 1890-1930, as compared with a rural rate of 7 2 per cent, and as a result, the proportion of the country's inhabitants living in places of over 2,500 rose from 35 4 per cent at the earlier, to over 56 per cent at the later, date

2 Rural urban

**PROPORTIONS OF RURAL AND URBAN POPULATION, 1860-1950**




The depression of the thirties reversed the trend, and for a decade few cities grew much But during and after World War II, the upward swing was resumed, with the Bureau of the Census revealing the urban proportion in 1950 at 63 7 per cent [3] Decidedly more than half—perhaps before long three-fourths—of the population of the country therefore will henceforth be found in urban areas, with municipal government correspondingly magnified in importance, rural governments harder pressed for subsistence, and rural voters (although still commonly over represented under district plans of election) likely to be swamped in contests on a state wide basis, as for example in the choice of presidential electors

During the decade 1940 50 population increased on nearly all age levels, but far from proportionally From a diminished birth-rate during the depression of the 1930 s, it resulted that in 1950 teen-age population (10 to 19) numbered a full two million less than in 1940 Adult population aged 20-64,

3 Age-group

[3] New definitions of "urban" and rural" however account for 5 per cent so that under former meanings the 1950 figure would have been only 58 7 per cent

too, although 10 million larger, was smaller in proportion to the total On the other hand, births reaching all time highs during early postwar years and continuing relatively high past 1950 raised the proportion of children of 0-9 years during the decade by almost 44 per cent, while people of 65 years and over also attained a considerably higher proportion In other words population in 1940 50 grew fastest at the bottom and at the top of the age scale, more slowly in the intermediate ranges, and on the teen age level not at all. Pressure upon school facilities was intensified, the burden of caring for the aged increased, and the task of finding manpower in younger brackets for industry and national defense became temporarily more difficult, although with military and productive potential bound to be greatly augmented during the 1960s

4 Race and nativity

Finally there are the matters of racial texture and ratio of native elements to foreign born Viewed racially, our population in 1950 was 89 7 per cent white, 10 3 per cent non white (9 9 per cent Negro, 0 4 per cent Chinese, Japanese, and other) Within the heavily dominant white element, 92 5 out of every 100 were native born of native or mixed native and foreign parentage, and 7 5 were foreign born Analysis of the many complicated data involved goes to show that the country is steadily becoming more "American," in the sense that native born whites of native parentage—have for some time been increasing at a rate even faster than the total population Here again is a fact of political as well as social significance giving promise of a more homogeneous population than that which in times past created problems of serious import, especially in the government of cities

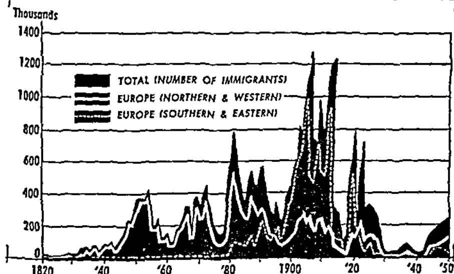
Immigration

Historically, the United States is, of course, an immigrant country, in the sense that all of our people except the Indians have come from foreign lands or are descended from those who did so at some time after the beginnings of European settlement on our soil, and for a long time our national policy was to encourage, and even stimulate, the influx of homeseekers, laborers, and refugees In the later nineteenth century, however, restrictions began to be imposed, and even before literacy tests were introduced in 1917, there were as many as 30 different grounds on which, by act of Congress, an alien might be denied admission Threatened by an inflow considered too large for assimilation, the country in 1921 adopted a new policy of numerical limitation under which, as the law now stands,[4] (1) all aliens ineligible for naturalization are debarred, (2) immigrants from American countries are admitted subject only to general exclusion regulations applying to anarchists, criminals, and the like, and (3) immigrants from Europe may be admitted only at the rate of a basic 150,000 (actually readjusted to some 153,700) a year, and only under quotas allotted to different nationalities in the same proportion to 150,000 that the number of persons of the given nationality resident in the country in 1920 bore to the total continental population at that time—the purpose of

[4] On January 29 1951 Senator Pat McCarran chairman of the Senate committee on the judiciary introduced a voluminous bill revising the country's entire code of laws relating to immigration naturalization and nationality Later in the year, subcommittees of both Senate and House judiciary committees were studying the measure in expectation that eventually it would be enacted although hardly before the session of 1952 Throughout the present chapter it therefore must be borne in mind that some changes may result from impending legislation

this "national origins" principle being to insure that the great majority of newcomers will be of northern and western European stocks [5]

Originally left mainly to state authorities, enforcement of the immigration laws has since 1891 been in charge of a staff of federal commissioners of immigration, stationed at the various ports of entry and assisted by inspectors, interpreters, and other subordinates, with supervision centralized in an Immigration and Naturalization Service in the Department of Justice In contrast with the earlier policy of screening alien applicants only after their arrival at American ports, initial responsibility for deciding whether a given alien is




qualified has since 1924 rested with the American consul in the area from which the migrant would come, with the result that nowadays comparatively few are turned back after making the journey to our shores Migrants are assigned to quotas according to the country in which born

## CITIZENSHIP AND HOW IT IS ACQUIRED

*What is citizenship?*

An element of unity amid diversity in the United States is a common citizenship, which indeed legally cements the American people into a nation To be a citizen, in this or any other country, means to be a member of a

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political society, subject to its government, and bound to its fortunes. Even for adults, it does not necessarily presume political power In the United States, nevertheless, there is a close connection all citizens of suitable maturity are voters, at least potentially and no one votes (or with very few exceptions holds office) unless a citizen—with the result of our sovereign *people* being in reality the sovereign *citizenry* Implied in citizenship, too, as the Supreme Court has properly reminded us, are "a duty of allegiance on the part of the member and a duty of protection on the part of the society'—reciprocal obligations (concretely between citizen and government), "one being a compensation for the other '[6]

Citizenship under the constitution

Curiously there long was a great deal of doubt about who in this country were entitled to be regarded as citizens, and of what jurisdictions In its original form, the constitution used the term no fewer than seven times, but without ever defining it In some clauses, it spoke of "citizens of the different states,' and in others of 'citizens of the United States", and nowhere were the relations between the two made clear Even yet, there often is popular confusion on the point In the Fourteenth Amendment, however, we read that "*all persons born or naturalized in the United States, and subject to the jurisdiction thereof* are citizens of the United States and of the state wherein they reside , and while this leaves the way open for two citizenships, capable of being separated, it plainly specifies who are to be considered national citizens and makes all national citizens residing in a state citizens of that state The only point of any significance at which national and state citizenships nowadays do not go together is in the case of national citizens having their legal residence in the District of Columbia, in a territory, or in a foreign country, and therefore devoid of any state citizenship Legally, we still have dual citizenship—national and state For every practical purpose, however, national *citizenship is primary, state citizenship only secondary and incidental*[7]

How citizenship may be acquired

1 By birth

Citizenship is acquired in various ways in different countries, but the most important are birth and naturalization Citizenship by birth arises from the operation of one or the other of two quite different principles Under the first—known as *jus sanguinis* ('law of blood or parentage")—a child takes the nationality of its parents, regardless of the place of its birth, under the second—called *jus soli* ("law of soil or place")—nationality is determined by the place of birth, irrespective of the citizenship of the parents The historical *and fundamental rule of the United States, in common with other English* speaking, and also Latin American, countries, is *jus soli* and the rule is con*strued to be applicable even to children born on American soil to alien parents* who themselves are ineligible to citizenship[8] The phrase of the Fourteenth

[6] Luria v United States 231 U S 9 (1913)

[7] *One encounters also the term "nationals which is not to be confused with citizens In* a general way it denotes all persons who for purposes of international intercourse, are identified with a given nation It therefore is broader than 'citizens", for example the inhabitants of the Philippine Islands, prior to independence owed allegiance as nationals of the United States but never were citizens thereof

[8] United States v Wong Kim Ark, 169 U S 649 (1898) For purpose of citizenship the "soil" of the United States includes the continental area, Alaska the *Hawaiian Islands Puerto* Rico Guam, the Virgin Islands, all American territorial waters American embassies and legations abroad and American warships and other *public* vessels wherever they may be

Amendment requiring that a person be not only born or naturalized in the United States, but "subject to the jurisdiction thereof," gives rise, however, to at least one exception children born to foreign diplomatic representatives stationed in this country are not American citizens, because even though born on our soil, they are considered subject to the jurisdiction of the state which the ambassador or minister represents, and not to the jurisdiction of the United States On the other hand, persons born abroad *before* May 24, 1934, are citizens if the father had American citizenship and resided in the United States or one of its outlying possessions at some time before the child's birth, and persons born abroad *after* the date mentioned are such if either of the parents was an American citizen who before the child s birth resided 10 years or more in the United States or one of its possessions, at least five years of which were after attaining the age of 16—although in this latter case the child must reside in the United States not less than five years between the ages of 13 and 21 In any event, an oath of allegiance must be taken at the age of 21 to establish citizenship beyond doubt

2 By naturalization

(a) Of populations collectively

The second main way in which citizenship is gained is by naturalization, which means the conversion of aliens into citizens by some kind of legal procedure Naturalization, too, may be either collective or individual The most usual collective form is the extension of citizenship by single act (treaty provision or legislation) to the people of an area acquired by purchase or conquest,[9] and down to 1898, citizenship was in this way conferred on the inhabitants of every piece of territory which we annexed[10] The treaty by which we acquired Puerto Rico, Guam and the Philippines, however, expressly provided that the cession of those islands should not of itself operate to naturalize their native inhabitants, and while eventually the Puerto Ricans (in 1917) and the Guamanians (in 1950) were collectively made "citizens of the United States," until then they were only insular citizens and American nationals—as was true also of the Filipinos until in 1946, independence terminated even the status of nationals On the other hand, when the Virgin Islands were annexed in 1917, citizenship was at once conferred upon all of the inhabitants who did not elect to retain allegiance to Denmark

(b) Of individual aliens

Naturalization is, however, usually individual, rather than collective, and in this form, too, it is, under authority given Congress to "establish an uniform rule of naturalization," exclusively a national function, even though state judges have a share in administering it The first federal statute on the subject —dating from 1790—assigned the work to the courts, and under supervision of the Immigration and Naturalization Service in the Department of Justice it is now carried on by courts of designated grades, *i e*, all federal district courts, the supreme court of the District of Columbia, and all state and territorial courts of record which have a clerk and a seal and have jurisdiction in actions at law or equity in which the amount in controversy is unlimited The original law was brief and general, and for 100 years much was left to

[9] A different form however appeared when in 1924 all Indians born within the jurisd ction of the United States were collectively naturalized

[10] Except non white inhabitants of Alaska and persons not Hawaiian citizens in Hawaii

chance, or at any rate to the discretion of the naturalization authorities As a result, grave abuses arose Following an extensive investigation by a commission appointed by President Theodore Roosevelt, Congress in 1906, however, enacted a far more adequate statute under which—as revised and in part superseded by a comprehensive Nationality Act of 1940,[11] and further by an Internal Security Act of 1950 [12] the work is now carried on in a considerably improved manner

Present mode of naturalization

The specified procedure is more complicated than in most other countries, and involves three main steps The first—commonly referred to as "taking out first papers'—is a declaration of intention to become a citizen, which may be filed with the clerk of any duly authorized federal or state court at an age of not less than 18 at any time after lawful admission to the country, and without reference to literacy or other qualifications [13] The second is the filing of a petition with the court (not less than two years nor more than seven after the declaration) affirming that the applicant has been a resident of the United States for at least five years continuously and of the state or territory in which he applies for at least six months, that he is not an anarchist or opposed to organized government, and that he expects to remain permanently in this country and is loyal to it and its institutions Full information must be given about both the candidate and his family (if he is married), and the application must be supported by affidavits of two citizens testifying to the applicant's period of residence, his moral character, and the general accuracy of the claims made in his petition The third step, taken not less than 30 days after the petition is filed, is normally a public hearing and examination by the judge, after which, if all goes well, that official authorizes the clerk of the court to issue letters of citizenship or "final papers" During the interval, the petitioner's claims usually are investigated by a naturalization examiner, who may merely present his findings in writing, but may also appear at and take part in the hearing, and in nearly every case, the commissioner s findings determine the action taken by the court Indeed, in some jurisdictions the candidate is heard by the examiner only, and appears in court only after having been given clearance for taking the oath of allegiance In virtually all cases the court administers the oath of allegiance to the United States as the final act

Still room for improvement

Although tightened up considerably in later years, the system still leaves a good deal to be desired The examination by the judge, or even the examiner, may be as thorough, or as perfunctory, as he cares to make it The applicant must swear that he "speaks English', but ability to utter "yes" and "no" sometimes suffices, and indeed one judge is reported to have been satisfied with a candidate who merely "nodded his head in English'' The law presumes intelligence, but provides no standards by which that somewhat flexible qualification is to be judged It presupposes some knowledge of the form of government of the United States—indeed the Internal Security Act of 1950 says ' the history and the principles and form of government"—but

[11] 54 *U S Stat at Large* 1137
[12] *Public Law 831*—81st Cong 2nd Sess
[13] A new naturalization procedure proposed in the McCarran B ll considered by Congress in 1951 (see p 82, note 4 above) omits this first step

leaves the way open for the widest latitude in testing such knowledge [14] "Final papers" cannot be issued within 60 days preceding any federal or state election, but this does not necessarily prevent over-zealous ward leaders and other politicians from getting tractable aliens through the mill in time to round them up at the polls For the courts, the work of naturalization is a side line activity which they carry on as effectively as they do only because of being provided with the assistance (particularly in the case of the federal courts, where most naturalizations take place) of the naturalization examiners The entire naturalization process being essentially a matter of fact finding, and therefore by nature administrative rather than judicial, it has been suggested that full power to admit to citizenship be transferred to such examiners with merely a right of appeal to the courts on questions of law

*Aliens who are ineligible*

Not all aliens, it must be observed, are eligible for naturalization, but only such as, in addition to meeting the other requirements,[15] are white persons, persons of African nativity or descent, Chinese, Filipinos Guamanians,[16] or persons descended from races indigenous to the Western Hemisphere or to India [17] Chinese (both older residents and the few newcomers legally admissible as immigrants) have been eligible only since 1943, Filipinos and persons descended from races indigenous to India only since 1946, and other Asiatics—Japanese, Koreans, Burmans etc —still are excluded either by the Nationality Act of 1940 or by judicial interpretation as not falling within any of the categories mentioned above [18] In 1944, the then retiring commissioner of immigration and naturalization called attention to the fact that, outside of Nazi Germany, the United States was the only country practicing racial discrimination in matters relating to naturalization, and despite recent efforts to end it, the stigma still rests on us In 1949, a bill clearing the way for both immigration and naturalization of Orientals regardless of country of origin, passed the House of Representatives, but failed in the Senate, and although a joint resolution of similar purport (except covering naturalization only) passed the House in 1949 and the Senate in 1950 the president reluctantly

with any proscribed class of subversives

An amendment to this act passed in 1951 provides however that membership in a totalitarian organization must have been voluntary and not solely for the purpose of obtaining food or employment.

[16] Placed in the list in 1950 when American citizenship was conferred on the inhabitants of Guam See p 562 below

[17]

[18]

States

to be

vetoed it because of what he considered objectionable "security" restrictions placed on all naturalizations As yet, therefore, only the categories of persons enumerated above are eligible

## OTHER ASPECTS OF CITIZENSHIP

Citizenship of married women

Formerly (from 1855 to 1922), an alien woman marrying a native born or naturalized American citizen automatically became herself (if a person eligible for naturalization) an American citizen, and, conversely (from 1907 to 1922), an American woman marrying an alien forthwith lost her citizenship In other words, a married woman's status was determined entirely by that of her husband As a result of persistent agitation led by various women's organizations, this no longer is true Prompted by unhappy experiences of women under the operation of the rule during World War I, and by growing recognition of women's claim to their own individuality as members of the body politic, Congress, in 1922, 1930, and 1931, conferred upon them progressively expanded rights of independent citizenship, and, finally, in *1934*, made nationality rights as between the sexes equal and uniform in all essential respects An American woman marrying an alien does not now lose her citizenship unless she chooses to renounce it, an alien woman marrying an American citizen does not herself automatically become an American citizen, but does become eligible for naturalization by a simplified procedure

How citizenship may be terminated

Citizenship, once possessed, becomes a constitutional right and cannot be abrogated except by procedures which are themselves constitutional, *e g*, in accordance with due process of law Whether acquired by birth or by naturalization, citizen status, however, may be voluntarily relinquished, or forfeited, or, if obtained by naturalization, may be cancelled as a punishment or penalty Although doubt long hung about the matter, Congress in 1865 expressly recognized the right of any citizen to "expatriate" himself, except at a time when the country is engaged in war, [19] and in 1907 it specified how this may be done, *i e* by being naturalized in, or taking an oath of allegiance to any foreign state, or serving in its armed forces if such service operates to establish foreign nationality Citizenship is forfeited, too, if (except for bona fide reasons of health, study, or business) a naturalized American lives continuously for as long as two years in a foreign state of which he formerly was a national, also if (with the same qualification) he lives as long as five years in any other foreign state Naturalized persons, furthermore, may be "denaturalized" by court action, *i e*, have their certificates of citizenship revoked if obtained fraudulently, or for disloyal utterances or acts—the presumption in the latter case being that the offender did not take the oath of allegiance in good faith In 1942, however, the Supreme Court held that membership in the Communist party, unaccompanied by overt disloyal acts, does not constitute sufficient ground for cancelling a naturalization [20]

2) Contrary to popular impression
the offender is likely to lose along
rivileges including the privilege of

## ALIENS—RIGHTS AND RESTRICTIONS IN PEACE AND WAR

Numbers and registration

Speaking broadly, every inhabitant of the United States is either a citizen or an alien—if an alien, presumably a citizen of some foreign state living *temporarily* or permanently in our midst In times past, no one knew how many aliens there were in the country or where they were located except as disclosed every 10 years by the census Growing tenseness of the international *situation in the* later thirties, however, combined with the increasingly difficult task of curbing subversive activities and influences, and climaxed by the outbreak of a major war in Europe in 1939 led in 1940 to a decision to *require every alien over 14 years of age to register and be fingerprinted* within a specified period, and thereafter to keep the federal authorities informed of his address and occupation[21] The resulting registration revealed a total of *4 9 million, or about 3 5 per cent of the entire population One effect of the* European, and later global, war was to make American citizenship uncommonly attractive, and as a result of more numerous naturalizations, combined with *the falling off of immigration during the war years, the number* of aliens dropped to 3 4 million by the middle of 1944—the smallest known figure in 35 years By 1950, the number was back at some 4 million, and since many had moved about without reporting new addresses, the Internal Security Act of that year required a new general registration for aliens of *all* ages during the first 10 days of 1951 and in the corresponding period of every succeeding year thereafter

Status in peace time

Under ordinary peacetime conditions, it does not greatly matter whether a person is an alien or a citizen He must obey the laws and pay his taxes in any case, if needed, he can be drafted for police or militia duty, he may sue and be sued in the courts enter into contracts send his children to the public schools, and in other ways follow the general pattern of American life An alien, furthermore, is entitled not only to "equal protection of the laws," but in general to the other civil liberties guaranteed in the constitution, such guarantees are in all cases made to "the people" or to "persons"—terms which the Supreme Court always has construed to include aliens And, of course, unless he happens to belong to a racial group that has been made ineligible (not many such remain), an alien may—if he can meet the requirements—be naturalized, thereby acquiring full citizenship status

There are, however, limitations An alien *cannot vote or (with extremely few exceptions)* hold public office, seldom can he act as a juror, his right to own property is commonly as broad as a citizen's, but not everywhere, because *California, Arizona, and half a dozen* other states forbid or severely restrict ownership of land by aliens ineligible for naturalization[22] And while,

[21] [illegible] (54 U S *Stat at Large* 670)—often referred to as the

[22] [illegible] d a stir in legal circles by [illegible] id invalidated by the United [illegible] heory of the court was that [illegible] ne supreme law of the land [illegible] tatute Pending the outcome [illegible] ue remains unsettled

in general, an alien can engage in any gainful occupation or profession that does not require a license, increasing numbers of businesses and professions have been put under license restrictions, and in almost every state there are laws debarring aliens from receiving certain kinds of licenses, *e g*, to practice law, medicine or dentistry The alien, further, may be barred from employment on public works and in munitions plants, and often he is prevented from sharing in welfare benefits such as workmen's compensation and old-age pensions, and of course if he goes abroad, he cannot claim protection from our government as can a citizen [23]

Inadequate protection against mob violence

Indeed, even here at home, an alien may fail to receive protection of person and property to which, legally, he is as much entitled as is a citizen At various times, "foreigners" have been the victims of mob violence, and as matters stand, with the states primarily responsible for maintaining law and order, such injured persons, or their relatives, have recourse only to state authorities (including grand juries and courts), which may easily be influenced by local sentiment to deny justice due At least four presidents have asked Congress to give the federal courts jurisdiction in such cases, but to no avail, and meanwhile the national government continues in the uncomfortable and undignified position of being responsible under international law for protecting aliens, but unable under our system of constitutional law either to punish the perpetrators of outrages or to compel a state to assume the burden of damages What usually happens is that after the federal government, pressed by the envoy of the foreign nation concerned, tries but fails to induce state authorities to act, Congress, on request of the president, votes a sum of money to be awarded *ex gratia* and the affair ends

Status during war

When war comes, aliens immediately fall into two categories—those of neutral or friendly nationality and those of enemy nationality, or "alien enemies" The war in which we became involved in 1941 (employing it as an illustration) had no very important effects upon the legal position of aliens in the former category If they wished to leave the country, they had to secure a permit prior to departure, those having assets of over $1,000 were required to report them But, in general, there was no sharp differentiation from citizens, in some instances, military service was exacted, as from the latter The case of alien enemies was, of course, quite different All over 14 years of age were subjected to a special registration (revealing approximately a million of them—mostly Germans, Italians, or Japanese); [24] all had constantly to

[23] As our immigration laws grew stricter the grounds on which aliens once admitted at our ports might be deported normally to the country of their origin (or at any rate to their port of embarkation) multiplied and whereas formerly deportees were usually mental or physical defectives criminals or immoral persons, persons who had become public charges or persons who had entered the country illegally they now include aliens identified with any organization or movement regarded as antagonistic to the political system, laws, and institutions of the United States Under the Alien Registration Act of 1940 indeed, an alien is deportable not only for advocating but for ever having advocated or ever having belonged to any party or other organization advocating revolutionary' doctrines or "doctrines of violence"—a provision which if enforced literally obviously would mean deportation of the alien members of the Communist party bag and baggage Deportees ordinarily number from 15 000 to 20 000 a year and persons adjudged deportable but allowed to depart at their own expense 10 or 15 times as many

[24] As of October 19 1942, some 600 000 Italians, because of their generally recognized loyalty to the United States were removed *en masse* from the classification.

carry certificates of identification, and were forbidden to enter "restricted" or "prohibited" areas, as around army camps, navy yards, and munitions plants, none could change employment without giving advance notice, none could keep in his possession firearms, cameras, short-wave radios, military maps, or other designated articles, any falling under suspicion were subject to arrest and possible internment, and in 1942, on joint congressional presidential authority and under military auspices, 110,000 Japanese—citizens as well as aliens—were evacuated from military zones on the West Coast to 10 "relocation centers" farther inland, from which those found loyal to the United States were in time permitted to go to other parts of the country in quest of homes and employment[25]

## THE PROBLEM OF LOYALTY

A fundamental obligation

American citizenship carries with it numerous guaranteed rights, liberties, and privileges (commented upon in the following chapter) It also carries obligations and duties, nowhere enumerated, but implicit in many constitutional clauses and phrases, and back of that, in the very nature of free government and its processes The citizen must help support his government with taxes, and if necessary with labor He must render military (or other defense) service if needed He must obey all valid laws and regulations Above all, he must bear full allegiance—in other words, be completely loyal—under penalty of losing his citizenship, his freedom, and even his life if disloyalty amounting to treason is proved against him Conceded almost every basic right enjoyed by citizens, resident aliens, too,—although presumably owing first allegiance to a foreign state—must, if they are to enjoy the benefits of life in this country, be loyal to the United States at least in the sense of accepting its institutions, abiding by its laws, obstructing none of its political or military processes, and having no part in conspiracies against its well being

The nature of loyalty

To say that all of our people must be loyal is, however, a good deal easier than to say precisely what loyalty means Our nation was founded in dissent, and even revolution The signers of the Declaration of Independence may have been loyal to an idea, to a concept of an Englishman's rights, but hardly to the king's government so eloquently indicted in Jefferson's roll call of grievances Presumption of dissent—if not of revolution (which Jefferson thought might be a good thing about every 20 years)—carried over also into the constitution, otherwise there would have been little point to confirming to the people rights of free speech, press, assembly, and "petition for a redress of grievances" For 160 years, too, our history has been suffused with heretical political doctrines, influences, and movements, and we have prided ourselves on our tolerance of such unorthodoxies We permit open criticism of our governments and their officers We allow groups to form and agitate for drastic changes in our public policies We hardly lift an eyebrow when someone

[25] In Korematsu v United States (323 U S 214 1944) a divided Supreme Court sustained this action but in *Ex parte* Endo (323 U S 283 1944) a unanimous Court held that evacuees who were citizens could not lawfully be detained indefinitely in relocation centers.

advocates replacing presidential with cabinet government, abandoning our federal system or even going over to socialism In the absence of evidence to the contrary we assume only good intentions toward the United States—in other words loyalty For with us loyalty is compatible with political criticism, dissent and heresy far beyond anything permissible under totalitarian régimes and even in certain democracies

There are nevertheless limits, and in general these are transcended when (1) the authority of the United States is flouted, (2) acts against the security of the United States are committed or condoned, or (3) demand for changes in our political and economic system is carried to the extreme of advocating change by unconstitutional means such as force and violence At any of these points disloyalty begins and public authority is entitled to intervene Too often disloyalty' is an epithet—a smearword hurled at people whose opinions are unpopular Mere heresy however, falls entirely outside of any proper concept of the offense and it never has been the American way to seek to repress such, at least by public action Only when heresy becomes conspiracy, leading or tending to lead to subversive acts, does it become a legitimate object for governmental repression

Rise of the Communist challenge

Starting with measures to curb the disloyal (loyalists from the British point of view) during the American Revolution and coming down through the trial and final conviction of top Communist leaders at New York in 1951 for advocating overthrow of the government by violence, there has been, in this country, a long record of public action for the suppression and punishment of disloyalty The Civil War yielded a leading chapter and pro-Germanism during World War I another During the past 35 years however the story has been dominated by efforts to curb a menace which first caught the country's attention immediately after World War I, when in 1919—two years after the triumph of Communism in the Russian Revolution—Communism on this side of the Atlantic first took organized form in a Communist party and a Communist labor party, split off from the older Socialist party Both groups were small and composed chiefly of aliens But both were frankly revolutionist and a series of bomb outrages perpetrated by their members produced an almost hysterical public opinion, for a time fully supporting the most spectacular campaign against disloyalty (under direction of Attorney General A Mitchell Palmer) that the federal government ever had waged The excitement died down, sober second thought revealed that in their raids, deportations, and the like the authorities had gone to unjustifiable extremes, and for 20 years Communism, while busily developing the espionage and other techniques today associated with it attracted relatively little notice, with the outlawed Communist party most of the time under cover

At the close of the period, a new threat from the Nazi movement assumed major proportions, and during the ensuing war years operations of Nazi and Japanese spy rings and their confederates remained the principal source of concern At no time, however, did Communism cease to be a problem, and with the speedy conversion of the U S S R after 1945 from nominal friend to avowed foe, the floodgates for Communist propaganda, intrigue, and other

subversive activity were opened wide Fascist and other non Communist elements hostile to our institutions still exist and are at work in the country But no one needs to be told that repression of disloyalty among us today is primarily a matter of checkmating Communism on both American and international fronts

*The essence of the Communist menace*

Communism's challenge in the United States arises from a number of ominous circumstances (1) Communism is itself an ideology totally incompatible with both the American way of life and the American constitutional system (2) Its archprotagonist the U S S R, is the driving force in a world Communist movement aimed at the destruction of free institutions and life everywhere (3) Communist techniques embrace propaganda, espionage, and deception in every form, with force and violence the means by which peoples clinging to their political and economic way of life are to be overwhelmed (4) The Communist party in the United States is not a true political party, but rather a subversive organization charting its course as directed from Moscow, and thus agent of a foreign power bent upon our destruction as a free nation (5) This party is not large, but its card carrying dues paying members are picked for their devotion to its principles, their zeal in supporting its activities, and their skill in insinuating its influence usually by innuendo, into every environment and situation within their reach (6) While itself small, the party is but a core around which cluster literally scores of groups and organizations presenting an apparently harmless front and bearing innocent-sounding names, but Communist dominated even though sometimes without perception on part of the full membership[26] (7) Communists and "fellow travellers' are found in higher as well as lower levels of government, in college and university faculties, in editorial offices, in churches, in the motion picture business, and in other circles, where they may keep their views strictly to themselves but on the other hand may surreptitiously feed out their poisonous doctrine or even conspire to treasonable ends No Communist or even fellow traveller, in the United States can be truly loyal to the Christian religion, to his community, or to the principles of constitutional government

*The federal government and disloyalty*

International tension during the later thirties culminating in World War II, resulted in a sharp growth in the United States of subversive influences and activities—Fascist, Communist, and otherwise—and launched a period in which problems of loyalty and disloyalty not only agitated the press and public, but stirred governments on all levels to drastic action A record of all that has happened in a decade and a half would fill a book, and a big one, here it is possible merely to mention a few main developments in the federal field

Speaking broadly, federal activities have fallen into two groups, according as they have related to (1) keeping persons considered tainted with disloyalty

[26] A roster of organizations listed by the attorney general in connection with the federal [illegible] 017 (see p 333 below) and regarded as of such [illegible] casts doubt upon a person s loyalty contains [illegible] ongresses, conferences institutes schools, com [illegible] now defunct) believed to be Communist or [illegible] y others regarded as subversive but not Com

1 Protecting the government from disloyalty within

out of government service, and (2) repressing disloyalty among the people generally To be noted especially in connection with the first are (1) Section 9 (a) of the Hatch Political Activities Act of 1939 making it unlawful for any person employed by the federal government to 'have membership in any political party or other organization advocating the overthrow of our constitutional form of government, (2) President Truman s Loyalty Order of March 21, 1947,[27] instituting a general program under which (a) virtually all incumbent federal employees were checked by the F B I for loyalty and, (b) through the F B I and a nationwide organization of agency and regional loyalty boards (capped by a review board in Washington), all appointees thereafter and all applicants were screened for loyalty—a program still operating under direction of the Civil Service Commission, [28] and (3) a clause of the Internal Security Act of 1950 expressly excluding Communists and members of Communist front organizations from employment by the government or in any defense plant or installation Of different character, but appropriate for mention is also a provision of the Labor Management Relations [Taft Hartley] Act of 1947 denying all benefits of National Labor Board procedures to any union having an officer refusing to declare under oath that he is not a member of the Communist party and that he does not favor the forceful or unconstitutional overthrow of government

2 General repression of disloyalty

Aimed at repressing disloyalty in the general body politic have been investigations, arrests trials and imprisonments, especially for espionage, and deportations of aliens charged with subversive tendencies More specifically, too, there have been (1) the Alien Registration [Smith] Act of 1940 making it unlawful knowingly to become a member of any organization advocating overthrow of any government in the United States by force or violence or to perform any service for such an organization, (2) the registration requirements laid down by the same statute and by the Internal Security Act of 1950—both reflecting anxiety that the government be able at any time to place its finger upon any alien under suspicion, and (3) the Un American Activities committee maintained by the House of Representatives for more than a decade and (notwithstanding much criticism of its spirit and methods) vigorous in investigating persons accused of subversive propaganda and in instigating judicial actions

The Internal Security Act of 1950

Something more must be said about the Internal Security Act[29] often referred to as the McCarran Act While rescinding the Smith Act s provision making Communist party membership unlawful this omnibus piece of legislation—enacted under an emotional popular demand for something immediate and drastic—reiterates various earlier restrictions such as that debarring Communists from federal office holding and continues by (1) sharply tightening the immigration and naturalization laws, (2) forbidding any Communist to seek work in a defense plant and requiring the secretary of defense to publish a full list of such plants (termed by President Truman a convenient

[27] Exec Order 9835 amended by Exec Order 10241 of April 28 1951
[28] See p 333 below
[29] *Pub Law 831—81st Cong 2nd Sess*

manual for spies), (3) empowering the government during war or insurrection to put Communists and others considered potential spies and saboteurs in detention camps and keep them there for the duration, although with appeal to the courts, (4) making it illegal to conspire to perform any act substantially contributing to the establishment of a totalitarian dictatorship in the United States, and (5) requiring all Communist-action and Communist front organizations to register with the attorney general within 30 days—in addition laying bare their finances—and all Communists (although not members of mere Communist-front organizations) likewise to register individually Enforcement rests with the Department of Justice, flanked by a five member Subversive Activities Control Board and a nine member Detention Review Board

Passed in both branches of Congress by overwhelming majorities, this measure incurred a strongly worded presidential veto on the ground not only that it would prove unworkable ('about as practical as requiring thieves to register with the sheriff ) and actually would stimulate the elements at which it was aimed in their efforts to create dissension and confusion in the country, but that it would "put the United States in the thought control business' and lead to official harassment of 'all our citizens in the exercise of their right of free speech" Notwithstanding vigorous support from many people, for this point of view, the House overrode the veto by 286 to 48 and the Senate (after a dramatic 19 hour filibuster) by 57 to 10, and whether or not to be viewed as a product of hysteria, as the President charged the act took its place among the very few of comparably stringent character in the country's history

Problem of enforcement

Certain it was that many parts of the new legislation gave promise of immense difficulties of enforcement, especially for an unsympathetic Administration, and one will not be surprised to learn that—with Communists determined not to register until compelled to do so with doubt about whether power of compulsion existed, with doubt even about the constitutionality of the registration and internment provisions—efforts to put the measure into operation were marked by much floundering and after many months still were only in their initial stage Assuredly if certain features of the law remained on the statute-book, issues arising from them could be expected to be fought out in the courts over a long period of time probably years Yet, until judicially sustained, they hardly could be made very effective, and meanwhile the government's necessary and proper loyalty objectives would run risk of becoming bogged down in a morass of overlapping contradictory, and confusing legislation

A suggestion

Taking it as an established fact (although there are those who minimize it) that subversive forces are a present grave menace to our institutions, it would be greatly in the country's interest if legislative, executive, and judicial rôles in handling the situation could be clarified and regularized on the basis of (1) Congress defining clearly what subversive activity includes, making it unlawful, deciding upon the general policy of the government in dealing with it, and indicating or providing the machinery and methods to be employed, but not undertaking to investigate the loyalty of individuals or groups as is still

mistakenly done through the House Committee on Un-American Activities, (2) the executive carrying out the policies laid down by conducting all necessary investigations and enforcing the penal or other statutes bearing on the matter, and (3) the courts deciding cases arising out of the work of the other two branches, passing on the constitutionality of laws or executive actions and keeping executive officers and investigating agencies within the limits fixed for them in the constitution and the statutes Only by conscientious adherence to some such properly ordered pattern of procedure can the dangers to free thought and expression inherent in the campaign against subversive influences and activities be kept at a minimum [30]

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[30] In January, 1951 President Truman appointed a nine member Commission on Internal

# CHAPTER 7

## The Fabric of Civil Rights

Authority above law vs liberty under law

Two sharply contrasted theories of government contend for mastery in the world today One is the concept of the state as something over and above, separate from and superior to, the men and women living under it—exempt from moral laws and standards, responsible to nobody, an end in itself, with the people merely pawns utilized for the state s purposes The other is the view of the state rather as an agency of the people—a social framework within which government exercises only such authority and powers as the people, by direct act or tacit consent, confer upon it The first was the doctrine of the Italian Fascists, the German Nazis, the Japanese warlords, and of fascist-minded people everywhere, and has much in common with Communist ide ology, the second is adhered to in democratic countries like the United States, Great Britain, and France Under the first concept government is independent, authoritarian, and the people have no "rights" or ' liberties" which they can assert against it, under the second, government is subject to popular control, and individuals and groups enjoy rights and liberties which it may not invade To be worthy of the name, any government must, of course, have authority, yet if it is not to be arbitrary and tyrannical, there must be restrictions upon how far it may go in regulating the actions and relations of those who owe it obedience The "authoritarians " or ' totalitarians," would have only *au thority*, independently arrived at and with no restrictions, the democratically-minded would have authority too, but conditioned on public consent and steadfastly confined within retaining walls beyond which stretch broad areas of human freedom

Civil rights of late a major concern

World War II hurled the most powerful of the existing totalitarian states except the U S S R into the dust, and when free peoples hopefully set about [illegible]

1 On the international level

[illegible] Charter accordingly proclaimed the principle of "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion " Near the close of 1948, a Universal Declaration of Human Rights, laboriously worked out by a U N Commission on Human Rights, was adopted by the U N General Assembly, and with this challenging statement of principles (since somewhat broadened)

as a basis, the Commission has been arduously drafting a five-part "International Covenant of Human Rights" which, after further review and revision, is to be placed before the nations for signature and ratification, becoming effective when approved by 20 of the number

2 In the United States

(a) A decade of remedial effort

Against this background of international effort, the United States in recent years, although justly credited with deep devotion to personal freedom and security, has witnessed at home the liveliest agitation of the subject since Reconstruction days Bearing a major share in defining and proclaiming human rights on a world basis, the nation was brought face to face with the question of whether, after all civil liberties were broadly enough conceived and well enough protected within its own immediate area of responsibility Even earlier, indeed there had been doubts and remedial efforts On the initiative of Attorney General (later Supreme Court Justice) Frank P Murphy, a Civil Rights Section had been created in 1939 in the Criminal Division of the Department of Justice to ferret out and prosecute violations of legally established rights To check employer discrimination among workers on grounds of race, color or national origin, President Franklin D Roosevelt had, in 1941, stirred controversy by setting up a Fair Employment Practice Committee (discontinued in 1946) In his annual message to Congress in 1944, the same chief executive had stretched prevailing concepts by bracketing freedom from want and freedom from fear with the more conventional freedoms of speech and religion as rights to which men everywhere are entitled and while such broadened contours were taken popularly as representing aspirations rather than objectives to be implemented, and in any case as primarily economic rather than political rights in general were brought to livelier public attention For many years too, a nation wide, privately organized and operated Civil Liberties Union had turned the spotlight on abuses and campaigned against legislation, administrative procedures, and judicial actions, as well as employer and other policies regarded (from a distinctly liberal viewpoint) as inimical to individual or collective rights In 1944, both leading political parties had written civil rights planks into their national platforms

(b) *"To Secure These Rights"*

Responding to growing public concern, President Truman, in 1946, intrusted to an able 15 member citizen Committee on Civil Rights the task of surveying the entire subject and making recommendations, and a vigorous and revealing report by this group the following year entitled *To Secure These Rights* although strongly disliked in the South, was received by the rest of the country as an outstanding public document The picture drawn was at some points gratifying but at many depressing Particularly dark spots showed up in the evidence brought forward of (1) lynchings going unpunished, (2) involuntary servitude under state peonage laws, (3) discrimination against Negroes not only in private employment and in the professions, but in the armed services and in government employment, (4) various forms of discrimination against aliens, (5) administration of justice in ways sometimes putting Negroes, Mexicans, Indians, and other minority elements at a disadvantage, (6) poll taxes operating in several Southern states to keep Negroes and impoverished whites from voting, (7) occasional failures of the courts'

cherished "separate but equal' doctrine to prevent racial segregation from working injustice, and (8) many and sundry violations of the fundamental freedoms of speech, press, religion, and assembly Stressing enlightened public opinion as manifestly the most basic remedy, the Commission proposed (among other things) (1) strengthening federal machinery for prosecuting violations of civil rights, (2) creation of similar machinery in the states, together with citizen commissions for studying the subject and keeping the public alert, (3) federal prohibition of lynching and peonage, and of poll tax qualifications for voting, (4) federal and state legislation outlawing such forms of racial segregation as "Jim Crow" cars, (5) enactment of a new federal law directed against "police brutality and related crimes", and (6) denial of federal aid to state and local agencies guilty of discriminative practices

(c) President Truman's program blocked

With this thought-provoking survey in hand President Truman lost little time in transmitting to Congress, on February 2, 1948 a strongly-worded message in effect offering a blueprint for bringing our civil-rights system, on a nation-wide scope, into better accord with our pretensions, [1] and a few months later, both principal parties again adopted platform declarations on the subject (the Democrats, however, only after a convention fight resulting in a walk out by 35 disgruntled Alabama and Mississippi delegates, followed by a split in the party in the ensuing campaign) With his party again in power, the President returned to the subject in his "state of the union" message of January 6, 1949, calling for prompt action to establish the "equal rights and equal opportunities which the founders of our republic proclaimed", and, no legislation on major issues having resulted, the call was reiterated in the next annual message and on later occasions, with similar failure of action

Several of the abuses listed in the Commission's report were found peculiar to no one section of the country Others, however, notably lynching, poll tax requirements for voting, and to a somewhat less extent unfair practices in employment, are characteristically Southern, and with these three receiving most attention in Congress, the country has experienced a resurgence of sectional controversy far from edifying Contending that federal action on such matters would project national controls into state affairs unconstitutionally, and that in any case the problems are being, and will continue to be, solved by the states themselves in their own way, a Southern *bloc* springs to action whenever legislation is attempted and, although only a minority, prevails through lack of cohesion and determination of other sectional elements A constitutional amendment (if such is needed) would be next to impossible to obtain, preoccupation of the country with international dangers and defenses has pushed civil rights issues (except as related to subversive activities) into the background, and solutions are not in sight Meanwhile, however, through executive orders, progress has been made in eliminating discriminative prac-

tices (although not segregation) in the armed forces and the federal civil service, and a few states have set up fair employment practices commissions and enacted antidiscrimination laws

## THE AMERICAN SYSTEM OF CIVIL RIGHTS—SOME GENERAL ASPECTS

"Constitutional and "legal" rights

As agencies or instrumentalities for exercising authority intrusted to them by the sovereign people, all governments in the United States have only limited powers—in the case of the national government, powers expressly or impliedly conferred, in that of the state governments, rich reservoirs of inherent and reserved powers, but powers also not unlimited In other words, the people, while endowing their governments with wide jurisdictions, have at the same time withheld areas of freedom which government is forbidden to invade, and this is where *constitutional* rights and liberties arise, being simply immunities enjoyed because of express or implied denials of governmental power Naturally, too the places where one will go to find out what these areas of immunity are will be the federal and state constitutions—more particularly, in the case of the former, the bill of rights' contained in the first 10 amendments, as supplemented by the Civil War amendments (chiefly the Fourteenth), and in the case of the latter, the articles or sections in form or effect comprising in every state a bill of rights, besides usually other scattered clauses

Of course this will not reveal all of the rights' of which one hears in everyday talk, it will disclose no right to vote or to hold public office—no right to practice medicine or to operate a motor car In short, it will bring to view only rights having a *constitutional* basis, not rights—perhaps better 'privileges"—resting only on statute or common law or perhaps administrative action If one is not allowed to vote or to practice medicine, there commonly is no redress on constitutional grounds, but only under the laws, or by getting the laws changed If there are to be fair employment practices, it must be because the laws require them and the courts enforce them, indeed, most of the so-called rights embraced in the Truman program are of this nature, *i e*, *legal* rights, determined, defined, and enforceable (if at all) by governments, but outside the purview of constitutions The rights, however, with which we are chiefly concerned in this chapter are *constitutional* and to these we now turn

Constitutional rights

1 Restrictions on *governments* only

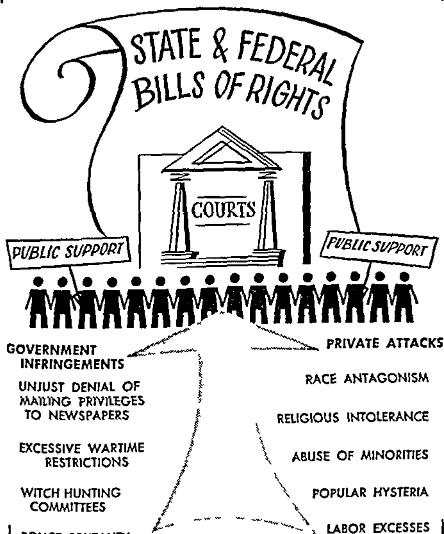
First of all (and to clear up frequent confusion), constitutional rights as such afford protection only against public or governmental, and not private, actions [2] If a person charged with crime is brought to trial in federal court, he must have the benefit of an impartial jury and opportunity to confront the witnesses against him, because the constitution requires persons responsible for handling the case to see that these advantages are allowed But if a mob seizes him at the jail and lynches him, there is no constitutional violation, for there has been no trial Private persons perpetrating the act may, and should, be proceeded against at law, but constitutionally the *government* is in the

[2] The sole exception is the prohibition of slavery

clear Again a gang of troublemakers may invade a public meeting and prevent a speaker from being heard, and the guilty may be punished for disorderly conduct But the *constitutional* right of free speech becomes involved only if and when the platform is denied by a major or some other *public* authority Redress for interference with civil rights by private persons must be sought under statutory (or common), not constitutional, law

Nevertheless, our system of constitutional civil rights is multiform and

**THE FOUNDATIONS OF OUR CIVIL LIBERTIES AND SOME OF THE DANGERS THAT MENACE THEM**



2 Complexity

highly complex To begin with, there are rights—including the "privileges and immunities of citizens of the United States" of which the federal constitution speaks—which can be claimed by national citizens only, others which, under state constitutions and laws, attach to state citizens only, and still others—many of them—to which all "persons," aliens included, are alike entitled In the second place, there are rights which are applicable only to natural persons, as human beings, and others (relating particularly to property) which apply, as well, to 'artificial persons" such as corporations The main complicating circumstance, however, is, of course, our federal form of government, for from this it results (1) that certain restrictions apply to the national government only, others to state governments only, and still others to both, (2) that of rights protected against interference by state governments, some derive from restraints imposed in the national constitution, others from restraints imposed in state constitutions, and still others from the mere absence of any granted or implied authority on the part of *any* government to interfere with them, and (3) that consequently there is latitude for considerable variation from state to state

3 How interpreted

Like all other portions of constitutions, articles and clauses guaranteeing civil rights require interpretation In enacting laws affecting rights, Congress and the state legislatures necessarily construe any constitutional provisions found pertinent, in enforcing such laws, administrative officials apply them according to what they think they mean, and in deciding cases turning on questions of rights, the courts speak the last word—at least until they speak again and perhaps differently The entire matter, therefore, is invested with such flexibility, even fluidity that anyone attempting a full and minute enumeration of the rights to which he individually is entitled would in the end be balked He could, of course, compile a lengthy catalogue simply from constitutional texts But he would find the Ninth Amendment specifying that "the enumeration of certain rights" [in the federal constitution] "shall not be construed to deny or disparage others retained by the people", and as to precisely *what* others, he would be left in the dark He would find the Supreme Court, in the historic Slaughterhouse cases of 1873,[3] confronted with a challenge to fix the metes and bounds of rights, but shying off with the tantalizing (though perfectly true) affirmation that interpreting them must be "a gradual process of judicial inclusion and exclusion" And even after he had supplemented and amended his list drawn from textual sources by incorporating everything relevant to be found in laws and court decisions, he still would not know what expansions, contractions, or other changes to anticipate from new laws enacted or new decisions handed down Especially fertile fields for interpretation of rights are provided on the federal level by the judicial power, the taxing power, and the regulation of interstate commerce, and on the state level by the judicial power and by legislation in the interest of public health, safety, welfare, and morals, *i e*, by exercise of the police power

From the beginning, civil rights protected against the federal government and against state governments have to some extent been interlocked under

[3] 16 Wallace 36.

blanket federal provisions like those prohibiting *ex post facto* laws and bills of attainder on both levels Nevertheless, the restrictions of the first eight amendments long were regarded as applying to the federal government only, and of course provisions of state bills of rights (often analogous) to state governments only The Fourteenth Amendment carried federally-imposed restraints deeper into the states by forbidding any state (1) to "abridge the privileges or immunities of citizens of the United States," (2) to "deprive any person of life, liberty, or property without due process of law," or (3) to "deny to any person within its jurisdiction the equal protection of the laws" But even yet there was supposed to be no particular connection between these provisions in one sphere and those of (for example) the First Amendment in another Designed chiefly to insure that freedmen would get fair trials in state courts, the mandates imposed were declared by the Supreme Court as late as 1922 to have no bearing on such matters as free speech

4 Tendency toward nationalization

Within less than another decade, however,—with state legislatures tending to run wild with restrictions on speech, press, and teaching—the Court was found "rediscovering" the Fourteenth Amendment and giving it a very different impact In a seditious-utterances case decided in 1925, a majority of the justices affirmed free speech and press, as protected in the First Amendment from abridgment by Congress, to be "among the fundamental rights and liberties protected also by the due process clause of the Fourteenth against impairment by the states"[4] Later, the same construction was extended to religious liberty and freedom of assembly, and thus by expanded interpretation these four fundamental freedoms were in effect "nationalized," in the sense that thenceforth the national constitution protected them on national and state levels alike In several sectors, federally protected and state protected rights still differ In the great core area of speech, press, assembly, and religion, however, we have what to all intents and purposes is a single national system, and if in time the Fourteenth Amendment's due process clause is held to cover still other federal guarantees, the system will be proportionally broadened

5 Rights relative not absolute

Finally, liberty is not license, and civil rights are not absolute, but relative After all, one of the main purposes of government is to prevent the safety and well being of the many from being jeopardized by the few Freedom of speech and press does not carry with it any right to utter or publish slander or libel or to incite persons to sedition, crime, or panic, freedom of assembly does not entitle any group to interfere with public order and safety To be validly claimed, a right must be exercised so as to cause no impairment of the same or any other right possessed by others Practical application of this simple principle often, however, raises difficult questions

Numerous and varied as they are, constitutional civil rights today fall rather naturally into (1) those relating to personal status and (2) those having to do with property Differently classified, they are also either (1) substantive, *i e*, pertaining to the fact and essence of freedom or (2) procedural, *i e*, relating to the methods by which freedom is protected The brief survey that can be presented here will follow these broad categories

[4] Gitlow v New York, 268 U S 652.

## RIGHTS OF PERSONAL LIBERTY: I. SUBSTANTIVE[5]

*1 Immunity from slavery and involuntary servitude*

So long as Negro slavery prevailed within our borders, no general immunity from personal servitude was, or could be, asserted. The Thirteenth Amendment, however, prohibits throughout the United States, and in all places under its jurisdiction, not only slavery, but every form of "involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted." According to the Supreme Court, involuntary servitude does not arise when a person is held against his will to the completion of a period of service, *e g*, as a seaman, which he has contracted to fulfill, but on the other hand does arise if a laborer who is indebted to his employer is required, on penalty of going to jail, to work out the debt in the employer's service (a form of peonage outlawed by a federal statute). Involuntary service in the Army under a draft law, or compulsory work on highways—falling within the legitimate exercise of the defense and police powers, respectively—does not constitute "servitude", nor does compulsory jury or posse service.

*2 Freedom of religion*

The First Amendment forbids Congress to make any law "respecting the establishment of religion or prohibiting the free exercise thereof", and the same restriction is imposed upon the states, not only by similar provisions of their own constitutions, but by the Supreme Court's interpretation of the Fourteenth Amendment's due process clause as applying in this field. Two things manifestly are forbidden: (1) the establishment of any official church, with people forced to accept its creed, attend its services, and support its activities by taxes, and (2) interference with private religious belief and worship. Individuals therefore are free to cherish such religious convictions as they like (or none at all), to declare them publicly and seek to win converts to them, and to engage in such forms of worship as they choose, while people in groups may organize churches and hold religious services according to their own preferences. The Supreme Court has ruled that these guarantees do not confer any right to violate a criminal statute in the name of religion, for example, they do not entitle a Mormon to practice polygamy. Likewise, they confer no license to perpetrate fraud, *e g*, by extracting money from the ill with promises of supernatural cure. So long, however, as there is no violation of law or breach of the peace, freedom of belief and worship must be unrestricted.

Many troublesome questions nevertheless arise, making work for both legislatures and courts. Numerous more or less conflicting Supreme Court decisions in cases growing out of the beliefs and practices of the vigorously non-conformist and litigious sect known as Jehovah's Witnesses have resolved themselves into conclusions (1) that where religious scruples are involved, school children may not be compelled, as a patriotic exercise, to salute the American flag, and (2) that public meetings and demonstrations and distribut-

[5] The group considered here must be regarded as only selective. Two substantive rights indeed—interstate citizenship (Art IV) and protection of privileges and immunities of United States citizens (Fourteenth Amendment)—have been treated above in a different connection (see pp 57, 59-60)

ing literature may not be interfered with so long as disturbances are not created or reasonable police regulations violated In a prominent New Jersey case, the Court has held the principle of separation of church and state not to be violated by use of public tax money in transporting children to parochial as well as public schools On the other hand use of public school rooms and of released school time for religious instruction, even negative as to creed, has been held not allowable All of these decisions—especially the third, invalidating existing practices in some 2,200 communities in 46 states—stirred lively popular repercussions, for the present at least, they represent the law

*3 Freedom of speech and press*

Cultural achievement and democratic government alike presuppose reasonable freedom of the people to express opinions orally, to write, and to print, and in the initial amendment to the federal constitution—now extended to the states by the Supreme Court s interpretation of the Fourteenth Amendment s due process clause—as well as in nearly all of the state constitutions, will be found provisions intended to protect political discussion and dissent, along with the interchange of ideas and opinions generally, against censorship and repression such as that which used to stifle all dissenting thought and expression under the Nazi and Fascist dictatorships in Europe No guarantee of a right better illustrates, however, the presumption of rationality and propriety upon which all civil rights are predicated Manifestly it never was intended that freedom of speech and press should extend to the utterance or publication of libels and indecencies, the incitement of insurrection, the encouragement of disobedience to law, the defamation of the government, or giving aid and comfort to foreign states in making war upon the United States And from the unfortunately partisan Sedition Act of 1798 to the First War Powers Act of 1941 under which President Roosevelt set up the wartime Office of Censorship, a good deal of restrictive national and state legislation, and also of regulatory executive action—especially during the Civil War and the two World Wars—could be brought together by anyone concerned with the history of the subject

In an opinion written by Mr Justice Holmes in 1919,[6] the Supreme Court laid down the salutary principle, now generally accepted, that freedom of expression ought never to be interfered with except when utterances and the circumstances surrounding them entail a *clear and present danger* of evils that Congress has a right to prevent, and six years later, the Court, as we have seen, extended to liberty of speech and press new protections derived from the Fourteenth Amendment's due process clause On the other hand, the Alien Registration Act of 1940 contained five sections comprising our first *peacetime* sedition law since that of 1798 and imposing some of the most drastic restrictions on freedom of speech and press in our history Quite currently, too—as illustrated by the attorney general s blacklisting of over 100 organizations as subversive without notice or hearing, by the operations of the Un American Activities committee of the House of Representatives, and by the startling Subversive Activities Act of 1950[6a]—the problem of dealing

[6] Schenck v United States, 249 U S 47 (1919)
[6a] Title I of the Internal Security Act of 1950

with Communist and Fascist elements which would destroy our democracy contains possibilities of threat in the end to one of our most valued civil liberties—freedom of opinion and the right to express it

4 Right of assembly and petition

Congress, further says the First Amendment, shall make no law abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances", and even if state constitutions did not commonly lay the same restraint upon state legislatures, the First Amendment, under present interpretation of the Fourteenth,[7] would do so Like other rights that of holding public meetings is not absolute, a meeting cannot be allowed to block traffic on city streets, to spread disease, to create a fire hazard, or to be employed for purposes of agitation against law and government In cities therefore, it is customary to require a permit from the mayor or other appropriate officer for holding any meeting in the streets or parks, and while there is supposed to be no restraint except that which a reasonable exercise of the police power entails in the interest of public health, safety, morals, and convenience, over zealous authorities undoubtedly at times make it difficult for people of radical inclinations to hold even innocent meetings

As for petition, the main question in the past has been whether the right to present a petition involves a right to have it heard and considered Theoretically, such a deduction would seem obvious, but in practice it does not follow Congress, every year, is flooded with petitions and memorials on all sorts of subjects Received without objection, printed in the *Congressional Record*, and usually referred to appropriate committees, they, however, are almost invariably pigeonholed and never heard of afterwards, otherwise, the two houses would have time for little else

5 Right to keep and bear arms

"A well regulated militia," says the Second Amendment, "being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed", and although the guarantee binds only the federal government, more or less similar provisions are found in many state constitutions The arms referred to are those of the soldier, and not only is it the right, but also the duty, of every citizen to bear arms, if called upon, in the service of his country Under the police power, the "bearing" of arms intended for private use, however, may be regulated and restricted by both the federal government and the states, and there are plenty of laws forbidding the carrying of concealed weapons (pistols, revolvers, dirks, bowie knives, sword canes, etc ) and the sale, possession, or use of sawed off shot-guns and other weapons not employed for military purposes but habitually used by criminals

6 Equal protection of the laws

No state, says the Fourteenth Amendment, may "deny to any person within its jurisdiction the equal protection of the laws" The original intent of this provision hardly extended beyond protecting the lately emancipated Negroes against discriminative treatment at the hands of the Southern states In practice, it has developed into a general guarantee against arbitrary classification and other forms of discrimination, and as such it is applicable to all persons (citizens and aliens, individuals and corporations) and to all kinds of civil

[7] This interpretation (explained above) was first applied to the right of assembly in DeJonge v Oregon (299 U S 353 1937) in which the Supreme Court invalidated police arrests of persons attending a peaceable meeting under Communist auspices

rights Furthermore, although the Fourteenth Amendment lays the injunction upon the states only, equal protection is construed as implied in the Fifth Amendment's due process clause, and therefore as binding upon the federal government as well On its face, the provision might seem to preclude all grouping or classification of persons or things with a view to differing status or treatment under the law But of course such literal construction would be an absurdity As an American jurist has remarked, the very essence of legislation is classification, and as the courts have repeatedly asserted, the purport of the "equal protection" clause is merely to require that when statutory classifications are made, they shall be reasonable with respect to the end sought, and that all persons or things standing in substantially the same relation to the law shall be treated alike

The severest tests encountered by the equal protection clause naturally arise from the mixed racial composition of our population, and especially from the intermingling of white and Negro elements, and among principles recently (1948 50) judicially established in this sector are (1) that while real estate owners may lawfully covenant not to sell or rent property in given areas in cities to people of color such agreements cannot be enforced in federal or state courts, or a colored person buying property in a 'white neighborhood" be evicted, (2) that people of color must be allowed not only equal, but the same accommodations with whites on railway trains operating in interstate commerce, and (3) that Negroes are entitled not only to equal opportunities in state supported professional and other higher educational institutions, but—where segregated institutions are only nominally equal—to the *same* opportunities in the *same* institutions

7 Treason restricted by constitutional definition

In the next place, every one is protected against the possible danger of being adjudged a traitor under impetuous or partisan acts of Congress, or through procedures of over-zealous prosecutors or courts, for treason against the United States is defined by the federal constitution, and neither Congress nor any law-enforcing authority has power to add to the definition As so defined, treason consists only in levying war against the United States or adhering to the country's enemies, giving them aid and comfort Furthermore, no person may be convicted of treason except on the testimony of two witnesses, or on confesssion in open court, [8] and while Congress fixes the penalty, it cannot in doing so impose any disability upon the convicted person s heirs or descendants It is to be observed, however, that sedition is closely related to treason, and that Congress may go as far as it likes not only in making acts seditious, but in providing for the punishment of persons committing them Treason trials in the federal courts of the United States have been neither numerous nor (except perhaps in the case involving Aaron Burr) dramatic John Brown, of Harper's Ferry fame, was executed for treason, but he was tried in a Virginia court and convicted of treason against ' the commonwealth " Each state may not only define treason for its own purposes, but prescribe such penalties as it sees fit

[8] Art III § 3 cl 1 In other words one cannot comm t treason simply by talking or conspiring against the government, he must actually *do* something, and there must be w tnesses to what he does.

## RIGHTS OF PERSONAL LIBERTY: II PROCEDURAL

1 Bills of attainder forbidden

During the political struggles of the seventeenth century in England, persons were "attainted" of treason and sent to the scaffold, or otherwise severely punished, by simple act of Parliament, with no judicial trial Often, too, their descendants were made ineligible to hold public office, and otherwise deprived of rights and privileges Properly enough—considering that similar practices had been by no means unknown in the American colonies—the authors of our national constitution took the position that punishments ought to be inflicted only in pursuance of verdicts of courts of proper jurisdiction Hence, national and state legislative bodies alike are forbidden to pass bills of attainder in any form [9]

2 *Ex post facto* laws forbidden

Similarly, there is full protection against *ex post facto*, *i e*, "after the fact," legislation [10] As defined by the Supreme Court, an *ex post facto* law is one which "makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action", or one which "aggravates a crime, or makes it greater than it was when committed", or one which "changes the punishment, and inflicts a greater punishment than the law annexed to a crime when committed", or, finally, one which "alters the legal rules of evidence and requires less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender" *Ex post facto* legislation is therefore penal legislation passed after the alleged offense was committed, which, if brought to bear against an accused person, would be to his disadvantage, and the enactment of such legislation is expressly forbidden to both the nation and the states Retroactive legislation on civil matters, *e g*, a measure making an income tax applicable to income already earned, and retroactive penal legislation which is not detrimental to an accused person, *e g*, a law reducing a penalty, is, however, permissible

3 Judicial processes regulated

*It is an axiom of Anglo-American jurisprudence* that a person suspected or accused of crime shall have a fair trial, according to humane methods, and with the burden of proof resting on his accusers, and in both the federal constitution and the constitutions of the states the entire process of criminal justice is surrounded with restrictions to this end Pettifogging lawyers and spineless judges too often try the public patience by twisting these restraints to the advantage of hardened criminals The fault lies, however, with those who abuse the sheltering provisions, rather than with the provisions themselves, administered properly, the safeguards set up are barriers against the conviction of innocent persons and against other miscarriages of justice Reenforced by stipulations of similar purport in state constitutions in behalf of persons accused of violating state laws, the national constitution throws around those accused of violating federal law the following broad blanket of guarantees [11]

[9] Art I § 10 cl 1
[10] *Ibid*
[11] In Art I § 9 cl 2 and Amendments V VIII

1 A person in civil life may be held to answer for "a capital or otherwise infamous crime" only on 'a presentment or indictment of a grand jury"

2 An accused person is entitled to a speedy trial, by an impartial jury of the state and district in which the crime has been committed

3 He has a right to be confronted with the witnesses against him, to have counsel for his defense, and to avail himself of compulsory process for obtaining witnesses in his favor

4 He may not be compelled to give evidence against himself, either orally or by producing books or papers

5 He is given security against "unreasonable searches and seizures"

6 He may not be "deprived of life, liberty, or property without due process of law"

7 Excessive bail may not be required, or excessive fines imposed, or cruel and unusual punishments inflicted

8 A person may not be twice put in jeopardy of life or limb for the same offense (except under separate federal and state authority)

(a) Indictment by grand jury

Some of these guarantees call for a word of comment Indictment by grand (*i e*, "large") jury came into American usage as a highly valued English common law procedure,[12] and originally was provided for not only in the federal constitution but in all of the state constitutions as well To this day, no person may be proceeded against under federal authority for "a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or the militia when in actual service in time of war or public danger" [13] Presided over by the judge functioning within the given jurisdiction, a federal grand jury consists of from 5 to 23 persons,[14] before whom the public prosecutor (normally a federal district attorney) makes accusations of crime, which thereupon are weighed privately by the jurors and either dismissed as being insufficiently supported by the evidence or made the basis of indictments charging persons named with committing specified crimes The object, of course, is to insure that no one will be inconvenienced and humiliated by being held for trial unless a substantial number of his fellow-citizens agree with the prosecutor that there is good reason for doing it The procedure, nevertheless, tends to be cumbersome, slow, and otherwise unsatisfactory, and approximately half of the states (amending their constitutions in so far as necessary) have substituted, all around or for certain types of cases, a simpler process under which the grand jury is dispensed with and the prosecutor merely files an "information," or affidavit, against the person under suspicion The grand jury, however, could not be displaced in *federal* procedure without amending the national constitution

(b) *Habeas corpus*

The privilege of the writ of *habeas corpus*—"the most important single safeguard of personal liberty known to Anglo-American law"—is guaranteed or assumed, within the appropriate spheres, by both national and state constitutions By virtue of it, any person arrested or otherwise detained on suspicion of crime may demand an immediate hearing in a court of proper jurisdiction

[12] It has however, now been abolished in England.

[13] Amendment V

[14] Michigan, however, has a system under which a single judge acts as a "[illegible] jury"

with a view to determining whether there is adequate ground for holding him The writ is addressed by the court (federal or state, as the case may be) to the officer having custody of the suspect and directs that the petitioner's "body" be brought into the court's presence If it develops that the prisoner is being held on insufficient grounds, he will be given his freedom, otherwise, he will be held for trial with or without release on bail Under constitutional provision, the privilege of the writ may be suspended by federal authority only "when in cases of rebellion or invasion the public safety may require it" [15] On the question of *who* may suspend, the constitution is silent, and usage has varied Strongly supported, however, by the Supreme Court in the famous Civil War case of *Ex parte* Milligan, the best opinion is that the function properly belongs to Congress, but that, under proper conditions, it may be exercised by the president in pursuance of express congressional authorization Some of the states, within their own spheres, have forbidden the writ's suspension altogether, but most of them allow the power to the governor

(c) Jury *trial*

Like indictment by grand jury, trial by petit, or trial, jury passed into American usage with the English common law The federal constitution provides for it in three different clauses,[16] and no state constitution fails to ordain it also In the federal field, the constitution requires it to be employed in "the trial of all crimes, except in cases of impeachment," and "preserves" it as a right, too in civil cases in which the value in controversy exceeds $20 It is, however, by common law that a federal jury must consist of 12 persons, must be "impartial, and must arrive at its verdict by unanimous vote It also is by common law that the right of jury trial does not apply to cases in courts of equity, to cases in contempt of court and to petty offenses, or misdemeanors, punishable only by small fines Formerly it was supposed that wherever applicable under constitutional provision or common law, jury trial must prevail The federal Supreme Court has now held, however, that since the device is intended fundamentally for the accused s protection, he may, if he considers it to his interest to do so, waive the right in federal proceedings, and many states allow the same discretion The Court, moreover, has ruled that where juries are employed, they must not be made up deliberately to exclude workingmen, Negroes, or any other particular class of persons—although there still are states in which women are debarred

(d) Searches and seizures

Another treasured inheritance from English common law implements the ancient maxim that every man's house is his castle "The right of the people," says the Fourth Amendment, "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated", and state constitutions commonly say substantially the same thing The language employed suggests that there are searches and seizures which are *reasonable*, and the Fourth Amendment goes on to define them as being those conducted on the basis of warrants (1) issued "upon probable cause, supported by oath or affirmation," and (2) "particularly describing the place to

[15] Art I § 9 cl 2 The only situation normally regarded as justifying suspension is one in which the regular courts are not in operation and martial law has been proclaimed perhaps in an area of active military hostilities

[16] Art III § 2 cl 3, and Amendments VI and VII

be searched and the persons or things to be seized" The Supreme Court has, however, recognized situations in which the police may legitimately make searches and seizures without a warrant Thus if it is known or thought probable that a person guilty of a felony or breach of the peace has taken refuge in a certain house, officers of the law may go in after him without waiting for written authority Likewise, if a search is to be made of a boat, automobile, airplane, or other vehicle which could take advantage of delay in order to move out of the officers' reach, a warrant is held to be unnecessary

(e) Due process of law

Underlying and cementing together the long list of judicial guarantees enumerated is that of "due process of law" From the beginning, the Fifth Amendment has forbidden the national government to deprive any person (individual or corporation) of "life, liberty, or property" without due process, and in 1868 the Fourteenth Amendment imposed the same restriction upon the states, reenforcing restraints of the kind nowadays found also in all state constitutions Operating as a limitation equally upon executive, legislative, and judicial branches of government on every level, due process has therefore become a paladium of individual and corporate rights as against all governmental authority in the country

The term nowhere *fully* defined

Notwithstanding its great significance, the term never has been fully and conclusively defined Broadly equivalent to the "law of the land" as guaranteed in *Magna Carta* and to the "rule of law" upon which English jurists traditionally have placed great stress, it has, like those phrases, been subject to steadily broadening and deepening interpretation Certainly the constitutions do not fix its bounds, and no more do the courts Efforts to apply it to the multifold actions and relationships of life have given rise to a stupendous amount of litigation and to an unending stream of judicial decisions, more cases find their way into the courts involving the due process clauses than any other provision of the federal constitution But, though sometimes pressed to do so, the judges have never cared—or dared—to try to frame any complete definition Rather, they have preferred, as the highest federal tribunal has said, that "the full meaning of the term should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise"[17]

Due process and procedural rights

On looking into the ways in which the term has actually been applied, one finds that sometimes it is invoked in defense of rights of a *procedural* character, i e, as a restriction upon the *manner* in which one may be deprived of life, liberty, or property, and at other times in behalf of rights that are by nature *substantive*, i e, as a restriction upon *what may be done* with similar result In the one form, it operates as a restraint principally upon the executive and judicial branches of government, in the other, principally upon the legislative branch In earlier days, due process was thought applicable (as in England) to procedural matters only The Supreme Court so construed it in 1856,[18] and the view stood until the last quarter of the century, when decisions turned it also to the defense of substantive rights on the ground of their being

[17] Twining v New Jersey, 211 U S 78 (1908)
[18] Murray's Lessee v Hoboken Land and Improvement Company, 18 Howard 272

*reasonable*, thus giving it a scope and importance which it never before had possessed Quite apart from due process, the rights of a person accused of crime are extensively protected by guarantees such as those of indictment by grand jury, trial by petit jury, right to counsel and exemption from self incrimination Contrary to what might be supposed, due process does not directly confirm or strengthen these particular rights What it does is rather to require, even more fundamentally that an accused person be given a *fair* trial before a court of proper jurisdiction If in a given circumstance, this means jury trial, for example, due process requires it, if the end can better be attained by some other procedure, due process does not insist upon a jury In civil cases, the situation is in principle the same due process requires merely (but of course this is the nub of the matter) a regular proceeding before a proper court, with a fair hearing for both parties

Due process and sub stantive rights

It was, however, when due process ceased to be a weapon merely against arbitrary and unfair procedures and was turned to stopping governmental actions because of *what they were* (rather than because of the method of their performance) that the rule attained its full importance, at least for a generation As indicated above, the change occurred during the closing decades of the nineteenth century, in a period when the states were vigorously meeting new conditions and problems arising from rapid expansion of their industrial life with drastic regulation of business, trade, and labor, and when disapproval or downright fear of what was happening gradually swung the courts—first in the states themselves and eventually on the federal level—to the view that due process might properly be invoked as a norm or test for determining the reasonableness, and therefore validity, of the controls undertaken Usually, too, the precaution was adopted in defense of threatened property rights, and perhaps most frequently in support of the principle that public utility rates must not be permited to frustrate opportunity to earn a fair return on the fair value of the property involved Under the due process clause of the then recent Fourteenth Amendment, the police power of the states came in for rigorous restraint, and simultaneously the corresponding clause of the Fifth Amendment was interpreted afresh to enable new restrictions to be placed upon federal power as wielded through legislation by Congress

Due process and the police power of the states

For many years now, there have been plenty of due process cases turning on the question of whether a given act of Congress deprives an individual or corporation of *life, liberty, or property*—freedom of person, *liberty of contract*, or what not—in a manner to be construed as violating due process But the principal field in which the rule operates today is that of the police power of the states, in that area, cases and decisions involving applications of it are legion The matter is complicated by the fact that, just as the courts refuse to attempt any general definition of "due process," so they find it impracticable to mark out any very definite boundaries for the police power, preferring rather to decide when the question arises whether any given act is to be construed as coming within the scope of that power Under commonest usage, however, the police power is viewed as including all regulative authority exercised for the protection and promotion of public health, safety, morals,

order, convenience, and general welfare—in short, authority to restrict and control individual and corporate freedom of action and use of property, in the interest of the public well-being When, nevertheless, a state, in pursuance of this residual and basic authority, undertakes to regulate the rates and services of public utility corporations, or to protect the health of women and children by restricting the number of hours a week that they may lawfully be employed in a factory, or to restrain citizens from making use of their property in ways considered deleterious to public health or morals, it is not unlikely to find itself accused of having deprived individuals or corporations of liberty or property, or both, without due process, and, a test case being brought, it falls to the courts to determine whether or not the contention is well founded Manifestly, great latitude of judgment is open to the judicial authorities in handling cases of this type Due process is nowhere precisely defined, the same is true of the police power, and the variety of considerations that may have to be taken into account is simply limitless In consequence, there is wide opportunity for the personal opinions susceptibilities, and social philosophies of the judges to influence the decisions rendered, and a court today may take a position diametrically opposite to that taken by it at an earlier time From having originally been simply the modes of procedure which were *due* at common law, due process of law has come to mean, in effect, whatever has the approval of the Supreme Court as reasonable And enforcing it becomes not merely a matter of settling disputes at law, but a matter as well—and a most important one—of fixing public policy

For a long time, the prevailingly conservative temper displayed by the judges in ruling on what a state might and might not do was viewed with much impatience by people concerned about liberal social and economic legislation President Roosevelt, however, brought on the Court enough younger, liberal-minded justices to give it a different complexion, and in recent years government functions and powers have been construed with a breadth and tolerance which have rendered due process on the substantive side decidedly less of an obstruction to state action than it used to be, and in so doing have forced our constitutional law back more nearly into its earlier channels Due process today affords increased protection for personal liberties, but less for property than a generation ago [19]

## RIGHTS OF PROPERTY

Civil rights extend to the protection of property interests as well as of personal freedom, and in certain constitutional provisions the two are bracketed together, due process, for example, applies to deprivation of property no less than to that of life and liberty State constitutions abound in provisions safeguarding property rights, and the national constitution, leaving the states severally free to determine for themselves what shall be regarded as property, throws around it, as so defined, a further shield of protective specifications

[19] On the weakening of substantive due process as a limitation upon social legislation taxation, rate-making and regulatory action generally see R J Harris "Due Process of Law" *Amer Polit Sci Rev* XLII 32-42 (Feb 1948)

Power of government to take private property

Government everywhere has power to take private property from individuals and corporations, otherwise it would have no adequate means of subsistence As a rule, it takes property (usually in the form of money) by one form or another of taxation Sometimes, however, it finds itself in need of some particular piece of property, *e g*, a plot of ground suitable for a public building, and possesses itself of it—irrespective of whether the owner wants to part with it—by virtue of the right of "eminent domain" A word may be added about civil rights as related to each of these procedures

Limitations

1 On taxation

The taxing power of both nation and states is broad and undefined, yet also subject to express or implied constitutional restrictions, such as, in the case of the states the prohibition of tonnage duties and of duties on imports or exports except as necessary for the execution of inspection laws, and in the case of the nation, the ban upon export duties and the requirement that all direct taxes be apportioned according to population Whatever comfort the taxpayer may be able to derive from limitations thus imposed he clearly is entitled to because his property cannot constitutionally be levied upon in violation of any of them Moreover, in laying and administering taxes, neither nation nor states may violate due process, equal protection of the laws, or other principles applicable to property, as well as to personal, rights For purposes of taxation, people may be thrown into different categories, some taxed and others not, some taxed heavily and others lightly But classifications must be reasonable for the purpose, not arbitrary, *e g*, not differentiating between Protestants and Catholics, and all persons in the same category must be taxed according to the same principle

2 On eminent domain

The power of eminent domain is one which every government must have In the absence of constitutional restraints, however, it would be peculiarly liable to abuse compensation might be inadequate, indeed, it might be denied altogether Hence, the Fifth Amendment not only forbids private property to be taken by the national government for public use without due process of law, but requires that "just compensation" be rendered, and the Fourteenth Amendment in effect (as well as the constitution of nearly every state more explicitly) imposes the same restrictions upon state and local governments It is true that the courts usually have interpreted eminent-domain clauses very broadly For example, they uphold the condemnation of land not only for purposes which are strictly governmental, *e g* the erection of a court house, but for purposes having any clear relation whatever to governmental functions, *e g*, the creation of a park, and they raise no objection to the exercise of the power by railroads or other private corporations to which the government has in effect delegated it, provided that such corporations are engaged in a business "affected with a public interest," that the property sought is essential to their activities, and that the same conditions are observed that the government itself would be required to meet

What is to be regarded as just compensation in any particular instance is likely to be a matter for judicial or administrative determination The government or corporation concerned ordinarily will make the owner an offer This probably will be refused Counter-proposals and mutual concessions may lead

to an agreement, as in an ordinary sale But if they do not, the owner can appeal to the courts, which will fix the amount that he may receive and must accept, or the decision may be reached by commissioners or other administrative boards All that is necessary to meet the requirements of the constitution is that a dissatisfied seller shall have an opportunity to be heard and to present evidence concerning the value of his property [20]

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Amendments I IX

# PART II

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# Political Opinion, Organization, and Action

## CHAPTER 8

# The People as Voters

It long has been a proud boast of Americans that theirs is a country in which the people rule Through constitutions freely made and amended, through party organization and elections, and by the force of public opinion, an electorate potentially embracing nearly 95 per cent of the adult population creates its own governments, endows them with powers, fixes the limits of their authority, chooses lawmakers and other policy framing officials,[1] and in these and other ways controls the broad objectives and currents of public action By any reasonable standard, this adds up to political democracy

A government of the people

Any one, it is true, having some acquaintance with the nation's history, and not altogether blind to what goes on around him, knows that, even among us, the democratic process has its limitations He is aware, for example, that the federal constitution was put into operation without ever being submitted to a popular vote,[2] that all amendments to it except one have been adopted or rejected by state legislatures acting without instructions on given proposals, that presidential candidates sometimes win with only a minority of the popular ballots, that rarely more than 70 per cent, and sometimes hardly more than 55 per cent, of those qualified to do so go to the polls even when a president is being elected, that the fate of many a significant bill in Congress is determined by seniority traditions governing committee chairmanships, by logrolling maneuvers, lobbying activities, and legislative by play (including filibustering in the Senate) over which the voters have little or no control He knows, in short, that if the people rule, they rule a good deal of the time at rather long range and by decidedly roundabout means and processes

Some limitations

Nevertheless, at bottom, the claim is justified—not simply because so many of our people can (whether or not they actually do) go to the polls and cast their ballots, but because they can do so as free men and women, voting for or against persons in office as well as out, for or against official policies, absolutely as they choose With 18 as the voting age, and for both sexes, the U S S R permits a larger proportion of people to vote than we do But the hordes who troop to the polls in Moscow or Petrograd do so only because it would not be safe to stay away, and often with no option except to vote

Yet a reality

[1] As well as numerous officials who not being policy-determining, might better be appointed than elected

[2] The same is true of six state constitutions now in operation including those of Virginia and Louisiana

obediently for candidates put before them by an authoritarian government The Soviet Union would be the democracy it pretends to be if democracy were a matter merely of *counting voters* Despite qualifications which any man can perceive, ours, on the other hand, is a government of the people for the good and sufficient reason that the voters not only are numerous but are the final authority, with power, both as a matter of law and in practical fact, to make government what they want it to be and to compel it, at least eventually, to do what they want it to do This is true whether one is thinking of the national government only or of the governments of the states and their political subdivisions as well, and we shall be better equipped to understand these different governments as going concerns if we first take a look at the bases of popular control on which they rest Four matters, chiefly, call for attention, in a brief series of chapters (1) the composition and characteristics of the electorate, (2) public opinion and the rôle of "pressure groups", (3) the organization of the electorate in political parties, and (4) the nomination and election of candidates for public office

## THE BASIS AND NATURE OF THE SUFFRAGE

The constitutional aspect

By the electorate, we mean, of course, the people entitled to vote The matter, however, is less simple than it sounds, because under our federal system every one of the 48 states is free to adopt its own suffrage regulations for state and local purposes, including whatever age, residence, tax-paying, literacy, or other qualifications it may care to employ, in other words, every state, through provisions written into its constitution, creates its own particular electorate Of course, this freedom is not quite absolute, for the Fifteenth and Nineteenth Amendments to the federal constitution forbid a state (or the United States) to deny or abridge the "right" of citizens of the United States to vote on account of (a) race, color, or previous condition of servitude, or (b) sex But to this extent only is the suffrage as determined by the several states required to conform to any single nation-wide pattern Moreover, there is no separate suffrage for national purposes Instead of providing for such, the constitution's framers simply wrote into the document a clause specifying, in effect, that in each state the electorate for choosing members of the "most numerous" branch of the state's legislature should be also the electorate for choosing the state's representatives in the lower house of Congress, and when, later on, members of the upper house, and also all presidential electors, became popularly elective, the same rule was applied [3] The federal constitution therefore *directly* confers the privilege of voting on no one, it merely specifies certain grounds on which people otherwise qualified shall not be *denied* the privilege, whether for national, state, or local purposes, and the national electorate (in the sense in which there can be said to be one) becomes simply the sum total of the 48 more or less differing electorates of the states

[3] The plan is prescribed for the choice of representatives by Art I § 2 cl 1 of the federal constitution for that of senators, by the Seventeenth Amendment and for that of presidential *electors (regarded as state officers)* by state constitutional or statutory provisions

Notwithstanding that the constitutional amendments cited speak of the "right" to vote, the suffrage is to be regarded as not properly a right but rather a privilege It no doubt is a right—a *legal* right—for those who have been endowed with it—so long as they do not disqualify themselves by, for example, committing a crime or going insane But there is no inherent right to be so endowed People urging an extension of the suffrage in one direction or another always, it is true, have been prone to picture voting as a natural right, the argument was heard repeatedly during the long campaign for the enfranchisement of women A sober view of the matter, however, suggests that, in the final analysis, who may vote and who may not is properly to be determined by considerations of general policy and expediency, and not on the theory that any particular class or classes of the people have an intrinsic right to be included Even citizenship, as our courts have declared repeatedly, carries with it no such right To be sure, no state now allows non citizens to vote But children are citizens, and no one proposes that they be made voters

The suffrage a privilege not a right

## SUFFRAGE EXPANSION SINCE THE EIGHTEENTH CENTURY

Disappearance of property and most tax qualifications

The history of the suffrage in this country particularly in the older states, has been in the main a record of progressive extension of voting privileges to new groups of people—non-property holders small taxpayers, ex slaves, women—although interspersed with contractions arising from the introduction of new tests such as that of literacy Originally, voting was confined in most states to male owners of a freehold estate in land, with here and there property of other sorts or payment of taxes serving as an alternative The period from 1815 to the Civil War, however, saw property qualifications lowered and finally to all intents and purposes abandoned, taxpaying requirements sometimes substituted but also gradually given up, and in many states aliens somewhat imprudently allowed to become voters as soon as declaring their intention to be naturalized From partisan motives, Connecticut in 1855 and Massachusetts in 1857 adopted reading and writing tests designed to disqualify the illiterate foreign born Nevertheless by 1860 most states had arrived at what may fairly be termed manhood suffrage for whites

Enfranchisement of Negroes

Since the Civil War, the suffrage has been broadened mainly by the enfranchisement of Negroes and of women A few Negroes voted in certain Northern states (mainly in New England) before 1860 General enfranchisement of people of color came only, however, as a result of new state constitutions and laws adopted, under pressure from the radical Republican majority in Congress, during the era of Reconstruction, and voting privileges for ex-slaves and their descendants, as indeed for Negroes in every part of the country, were supposed to be guaranteed for all time by the Fifteenth Amendment

Enfranchisement of women

Demand for the enfranchisement of women was heard as early as the Jacksonian era, and here and there it was pressed rather vigorously during the later stages of the Abolition movement No legislature or constitutional convention, however, in this period gave serious attention to petitions on the subject, if noticed at all, they evoked only ridicule After the Civil War, the

situation changed The Negro had been enfranchised, the great majority of men were voters, and advocates of votes for women no longer could be simply laughed out of court The first major triumph of the cause was in Wyoming, where in 1869 women were given the privilege of voting for territorial officers on the same terms as men On being admitted to the Union in 1890, this territory preserved its woman suffrage arrangements, and before the close of the century Colorado, Idaho, and Utah also became equal suffrage states The movement then slackened But about 1906 it gathered fresh momentum, and in five years (1910 14) a number of states adopted equal suffrage until the total reached 11

Meanwhile the suffragists turned to the larger objective of a general nationwide enfranchisement To this end, some urged amendment of the national constitution so as to require a state to submit the question of woman suffrage to its electorate on petition of as few as 8 per cent of the voters Others, considering this 'states' rights" approach too slow and uncertain, threw their support to the "Susan B Anthony amendment" (first brought forward in 1869), forbidding the United States or any state to withhold the ballot on account of sex The movement finally centered upon this latter plan, and a few years of vigorous agitation brought complete success The Nineteenth Amendment, embodying the Susan B Anthony proposal, was adopted by Congress in 1919 and ratified by the requisite three-fourths of the states during the next 14 months Proclaimed August 26, 1920, it met its first test at the national and state elections of the following November

Women as voters

The women of the entire country—or such of them as can meet the residential and other qualifications required in their states—thus have had the suffrage more than three decades It would be interesting to know precisely how they have voted during this time, and to what extent they have influenced electoral results Unfortunately, such information is not to be had, for while an industrious inquirer can get significant information on relative degrees of political interest by counting the numbers of men and women, in any electoral area, whose names appear on the lists of registered voters, and even the numbers of those who present themselves at the polls at a given election, nowhere are the ballots cast by women and by men tabulated separately Such evidence as exists, however, indicates that, by and large, women voters are not very different from men voters Some are vigilant and intelligent, many are uninformed and apathetic, some make up their own minds, others merely do as a ward leader, a member of their family, or a clergyman, tells them, many go to the polls voluntarily and with scrupulous regularity, many go but seldom and only when pressed to do so, and many do not go at all [4] In no part of the country does it appear that they have been responsible for any change in the relative strength of the different parties, nowhere can they be credited with overthrowing an important political boss or with "cleaning up corruption in government" Suffrage for women is sound in principle, and entirely correct

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0 per cent.

as a matter of policy, but it has not worked, and should never have been expected to work, a revolution

*Women in political life*

Participation of women has, however, added some new and interesting features to the political life of the nation It has more than doubled the potential electorate and considerably increased the cost of registering voters, carrying on campaigns, and conducting elections In party conventions, on party committees, and in the rough and tumble of electoral campaigns, women increasingly share almost every form of activity engaged in by men [5] Laws (particularly relating to social welfare) have been enacted, in Congress and especially in state legislatures, which might not have prevailed without the impetus imparted by women, *e g*, the Federal Child Hygiene [Sheppard-Towner] Act of 1921 In addition to appointment to sundry administrative posts, both in the states and at Washington, women have been elected to both higher and lower public offices, including two governorships (in Texas in 1924 and 1928 and Wyoming in 1924) and two United States senatorships (in Arkansas in 1932 and Maine in 1948)—although the remoteness of most of these dates indicates no present trend toward increased service on such levels Since 1930, from five to ten members of the national House of Representatives have been women (eight were elected in 1948 and nine in 1950, with another added in a special election in 1951), and later years have seen as a rule from 175 to 200 women in state legislatures, well distributed regionally except in the South The country is dotted with nonpartisan state and local leagues of women voters (on January 1, 1951, 35 state and 739 local), linked up since 1918 in an active and influential national organization now known as the League of Women Voters of the United States—all concerned primarily with educating women (and incidentally men also) to vote with intelligence and discrimination, and with securing remedial legislation and other reforms, national, state, and local A National Woman s "party" is working for full legal equality of women with men to be attained through an 'equal rights" amendment to the national constitution, followed by the requisite federal and state legislation

## THE SUFFRAGE TODAY

*General qualifications age citizenship residence*

Looking over the electoral systems of the several states at the present time—under which nearly 65 per cent of the total population can qualify to vote, as compared with hardly more than 3 per cent during the Revolutionary period—one notes certain suffrage qualifications employed in all states and others prevailing only here and there In the first category fall age, citizenship, and residence [6] In every state except Georgia, the minimum age is 21,

[5] On women in national nominating conventions see p 180 note 7 below [illegible]

[illegible] 100-101

[6] Certain categories of people are of course almost everywhere debarred *e g* persons convicted of felony or other crime and persons adjudged of unsound mind and in various states offenses against the election laws (such as bribery), malfeasance in office and vagrancy or pauperism are further grounds for debarment

considering that persons old enough to be drafted into military service are old enough to vote, and besides are as likely to have the requisite civic alertness as many other people, that state, in 1947, reduced the minimum to 18 Since Arkansas fell into line in 1926, citizenship is everywhere required The commonest requirement relating to residence is that the voter shall have lived in the state at least one year, some specified portion of which (typically three or six months) usually must have been spent in the county, and some briefer portion in the precinct, in which one's ballot is to be cast

Some special qualifications tax paying and literacy

Except in connection with local bond issues, and save for poll taxes still a prerequisite in six states, tax-paying—once a widely prevalent qualification —has been generally discarded In earlier times, educational, or "literacy," qualifications were uncommon Today, however, they are in use, in some form, in 17 states (including eight in the South and four in New England), and are authorized by constitutional provision in two or three others where the legislature has not yet seen fit to introduce them Indeed, such qualifications may be said, broadly, to have succeeded to the position once held by property qualifications, although, popular education having reached its present level, they operate to debar a far smaller proportion of the people [7] Assuming honest administration, there is much to be said for the principle of the literacy test The electorate having now been expanded almost as far as possible (except perhaps for lowering the age qualification), the next step would seem to be to "trim it at the edges" by eliminating the least fit Assurance that a person can read and write no more guarantees that he will always vote wisely than testing an applicant for an automobile driver's license insures that he will invariably operate his car with safety for himself and others But it is as effective a means as we have of debarring people who, by and large, are most likely to be unfit And while at first glance the plan might seem undemocratic, and consequently out of harmony with American principles, the fact that nearly all states now make it possible for practically any man or woman, even of low intelligence, to receive an elementary education without cost—in evening schools, if in no other way—relieves it of any such opprobrium The road to the ballot-box may very appropriately lead through the school house

## THE PROBLEM OF NEGRO VOTING IN THE SOUTH

The search for respectable methods of disfranchisement

At the close of the Civil War, the Southern states were compelled to give the freedmen the ballot as a condition of being restored to their previous position in the Union, and the Fifteenth Amendment sought to make enfranchisement permanent by prescribing that the right of citizens to vote should not be "denied or abridged by the United States *or by any state* on account of race, color, or previous condition of servitude " Unhappy results followed, especially where control of legislatures by inexperienced and gullible Negroes, abetted by Southern "scalawags" and Northern "carpetbaggers,"

[7] In some states the test is confined to ability to read (commonly a few lines of the state constitution) in others, it covers also ability to write

brought on an orgy of financial extravagance and foolish legislation, and it is not surprising that after coercion from federal troops was withdrawn (in 1877), strong measures should have been invoked for reestablishing white supremacy and insuring it for the future For a time, reliance was placed mainly on keeping Negroes from the polls by Ku Klux intimidation But such overt lawlessness, even if entirely effective, could not in the long run be defended, and search began for more respectable, even 'regular," methods The hurdle to be surmounted was, of course, the Fifteenth Amendment, so long as that constitutional landmark stood, no Negro could lawfully, by *public* action and *simply as a Negro* be kept from voting

The Mississippi plan

Negroes, however, commonly were illiterate, and also poor, and this opened a way out of the dilemma In 1890, Mississippi set the pace for her sister states by writing into her constitution clauses under which, in order to vote, one not only must have lived two years in the state and one year in the election district, but must have paid all taxes assessed against him (including a poll tax of two dollars), and must be able either to read any section of the state constitution or to give a reasonable interpretation of it when read to him And these requirements very well served their purpose The lengthy period of residence barred large numbers of Negroes accustomed to drift from plantation to plantation *Even if a colored man succeeded in paying his poll tax on* schedule (and it was artfully required to be paid a year before election time), he was likely to be careless enough to be unable to produce his tax receipt when called for Few Mississippi Negroes could read and still fewer could give an interpretation of a perhaps craftily selected passage from the state constitution likely to be accepted as 'reasonable' by a white official strongly predisposed against Negro voting Although every one knew that the primary purpose of the regulations was to keep the Negro from the polls, not a word was said in them about 'race, color, or previous condition', and when the federal Supreme Court surveyed them in a test case, it was unable to find that they in any manner violated the Fifteenth *Amendment*[8] *Clauses of similar* purport accordingly found their way into the constitutions of most other Southern states, and, for the time being, the problem seemed solved

"Grandfather clauses"

There was, however, one drawback the restrictions operated to debar not only Negroes, but also large numbers of whites But for this, also, a remedy was found—in the so-called 'grandfather clauses" adopted at one time or another, as constitutional amendments, in as many as seven states The clauses differed in details, but their general purport was to open a way by which any man, otherwise qualified but without reference to property or literacy, could become a permanently registered voter if either he or a lineal ancestor had been a voter on January 1, 1867—the significance of this date arising from the fact that it preceded by two months the first act of Congress prohibiting the disfranchisement of freedmen No Negro could get on a voters' list under the new provision But the poorest and most illiterate white could do so, usually because of being the son or grandson of a voter of 1867, and in this way the number of white voters was materially enlarged and the principle of white

[8] Williams v Mississippi, 170 U S 213 (1898)

supremacy correspondingly bolstered All of the clauses were for a duration of only a few years, or even a few months, and all had served their purpose and expired before the Supreme Court, in 1915, got around to pronouncing them discriminatory, contrary to the Fifteenth Amendment, and therefore unconstitutional [9]

Later developments

For a generation or more after the Civil War, the suffrage policies of the Southern states stirred lively discussion and protest in other sections of the country Eventually, however, as it came to be realized that substantially all upper- and middle-class Southerners looked upon the restrictive system as politically and socially indispensable, and that (with, of course, many exceptions) the disfranchised were both poorly qualified for political power and not greatly concerned about attaining it, Northern disapprobation diminished, in 1912, the Republican party significantly stopped putting in its national platforms the time honored denunciations on the subject The issues involved, however, always were potentially explosive, and in the past decade and a half one of them—the use of poll taxes to keep down the Negro and poor white vote—has been responsible for bitter sectional and partisan controversy in Congress, with the courts also in the same period addressing themselves with new vigor and changed outlook to another major problem, *i e*, the white primary

1 The poll tax issue

The question of the poll tax springs, of course, from the fact that while since 1920 North Carolina, South Carolina (as recently as 1951), Louisiana, Florida, and Georgia either have abandoned the tax altogether or have severed all connection between it and the electoral process, half a dozen other Southern states still make the payment of such a tax a prerequisite for voting in primaries or elections or both [10] How much effect the tax actually has in keeping Negroes from the polls, no one can say, because, of course, many whom it otherwise might debar already are debarred by literacy or other tests Indeed, until of late, nearly all would have been debarred in any case by white primary regulations, now, however, largely broken down But Negro voting is distinctly heavier in states not having the tax requirement, by opening a way for blocks of poll tax receipts to be bought up for distribution among people whose votes can in that way be corralled, the requirement has contributed to political corruption, and many people regard it as palpably contrary to the spirit of American institutions

Growing disapproval led first to attack through judicial action In 1937, however, the federal Supreme Court was unable to see that, in the absence of prohibitive federal legislation, the tax requirement was more than merely incidental to raising revenue, and with this avenue apparently closed, effort shifted to Congress, where for a decade a running fight on the restriction has been kept up, as yet without avail Five times between 1942 and 1949, bills outlawing poll tax qualifications in all federal elections (including primaries) passed the House of Representatives But in every instance final enactment

[9] Guinn *v* United States 238 U S 347 invalidating Oklahoma s clause

[10] The present poll tax states are Alabama Arkansas Mississippi Tennessee Texas and Virginia Since 1949 Tennessee has required payment of the tax for participation in final elections only not in primaries and has exempted women and veterans

was frustrated by committee inaction or by Southern filibuster or threat of such in the Senate, and not even strong emphasis given the matter in President Truman's civil rights program of 1948-50 availed to change the situation. Within a general states' rights context, the Southern argument has been that Congress has no constitutional power to legislate on the subject, and that, notwithstanding popular defeat of anti poll tax amendments in both Virginia and Texas in 1949, the Southern states can be trusted to take care of the problem themselves—as, of course, some (including South Carolina in 1951) already have done.

2. The white primary

In at least 10 Southern states—the "Solid South," i.e., solidly Democratic—the Democratic party is so paramount that nomination in a Democratic primary is equivalent to election. And this a good while ago had the practical effect of moving the suffrage question back by one stage, i.e., from the election (actually hardly more than a ritual) to the primary. If Negroes were to be deprived of political power, it was at least as important to keep them from voting in primaries as in the later elections. In most Southern states, the situation—in so far as not taken care of by the poll tax and other requirements—was for a time met by "white primary" measures empowering political parties to impose qualifications of their own for voting in their primaries, over and above any laid down in the state constitution and statutes—with the inevitable result in the case of the majority party of Negroes being ruled out. In 1923, Texas went so far as to try to debar Negroes from Democratic primaries by express statutory provision. To this, the Supreme Court objected. In 1935, however, a white primary system instituted by a party convention—a purely private agency—won the justices' approval (the Fifteenth Amendment forbids only restrictions imposed by state or national *governments*), and on this basis the problem seemed to have been solved.

A new Court takes a new position

It turned out, however, that the Court had not spoken its last word. To start with, in 1941 it decided a Louisiana case in which, contrary to what had seemed its previous opinion, the authority of Congress to regulate elections was construed to include authority to deal also with nominations as being simply a phase of the electoral process,[11] and while the newly found power has never as yet been exercised, it clearly suggested possibility of the entire white primary system being overthrown from Washington. But more was to follow. In another surprise move, in 1944, the Court (now with quite altered personnel) squarely reversed its position of nine years earlier by holding Negroes, notwithstanding all party rules to the contrary, entitled under the Fifteenth Amendment to vote in Democratic primaries (and of course in elections) in Texas.[12] From this startling development, only one conclusion was possible: the white primary was doomed. For a time, it is true, futile efforts were directed in various Southern states to discovering ways of getting around this logic. In South Carolina, for example, all constitutional and statutory provisions on the subject of primaries were promptly repealed, with parties left free to operate primaries of their own under any rules they desired.

[11] United States v. Classic, 313 U.S. 299 (1941).
[12] Smith v. Allwright, 321 U.S. 649 (1949).

When, however, debarment of Negroes from Democratic primaries was challenged, a federal district court held the regulation unconstitutional a federal court of appeals concurred, and the Supreme Court refused to call up the case for review, [13] and the best that the party could do was to procure a new *state primary law, not barring Negroes as such, but at any rate excluding* the greater number through electoral qualifications imposed in general terms No other state hit upon any more effective way of softening the impact of the Smith v Allwright ruling

The problem of Negro voting not yet solved

Legally, therefore, the white primary is dead Not only so, but the Supreme Court's newly developed interest in enforcing the Fourteenth and Fifteenth Amendments (combined with the potential control over nominating procedures attributed by the Court to Congress) suggests the possibility of still other Southern restrictive devices—literacy tests, "understanding" tests, "character' tests perchance even the poll tax—eventually being stricken down So long, however, as these and other barriers—administered by whites bent upon Negro exclusion, if not by one means, then by another—remain, the number of Negroes able to take part in primaries and elections will continue severely limited, even the white primary rulings mean only that Negroes cannot be excluded simply *as Negroes*—they still may be barred on plenty of *other grounds, legal or extralegal Since 1946, it is true, more Negroes,* especially in cities, have been voting notably in Alabama, Florida, Georgia, Mississippi, and Texas Yet of more than 5 million in some 10 Southern states, the total even registered in 1947 (the number actually voting is always far smaller) was only 645,000

In the over-all view, developments of the past few years represent progress with a difficult situation Many Southern Negroes, however, still are poorly qualified for political power, many manifest no desire to vote, considering rather that "politics is white folks' business" (or at any rate dangerous colored folks' business), and with people of color numerically rivaling the white populations in a number of states, the latter can be expected to give up only slowly and grudgingly the idea that their security depends upon maintaining some sort of restrictionist policy A generation that attaches increasing importance to literacy as a qualification for voting hardly can repress the conviction that the initial mistake was made when the Southern states were compelled by national authority to enfranchise Negroes *en masse,* and with no preparation, three quarters of a century ago It also should recognize that the error cannot be corrected, even at this late day, by mere passing or repealing of laws, but only by cultivation of tolerance and promotion of education over a long period of time [14]

[13] Rice v Elmore 165 F (2nd) 387 (1947), *cert denied* 333 U S 875 (1948)

probably never will be

## THE ELECTORATE'S TASKS AND THE PROBLEM OF NON-VOTING

**Officers and measures voted on**

Such are the complex and sometimes devious lines on which our country determines who shall have the political power that goes with voting. What is there for the electorate as thus defined to do? From state to state, there is a good deal of variation. In every state except Delaware, a new constitution or constitutional amendment normally, but not invariably, must be submitted to a popular vote. In 21 states the voters may ratify or veto measures that have passed the legislature, and in 19 they may also directly initiate laws. In hundreds of municipalities, they occasionally exercise similar powers of direct decision on bond issues and other proposals. In all states they elect the members of both branches of the legislature,[15] the governor and varying numbers of other state officials (including many judges), and widely differing, but always extensive, lists of county, city, town, and other local officers and boards.[16] By discussion, petition, criticism, and other more or less indirect means, they help the policy framing authorities discover the public will and carry it out. In the sphere of the national government their tasks are fewer. They support or oppose constitutional amendments, but do not directly vote upon them. There is no national initiative or referendum for either constitutional provisions or laws. Aside from formulating and expressing opinion (through political parties and in other ways), the voters, indeed, merely elect officers. And the number that they elect is not large, *i.e.*, only the president and vice-president and the members of Congress.

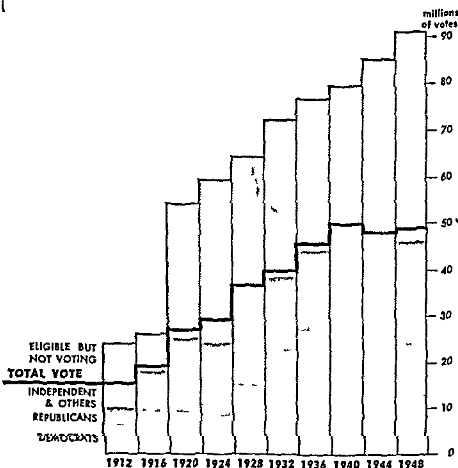
**Non voting**

How faithfully do those of our people to whom it falls, as voters, to supply the popular control which our system of government presupposes live up to their responsibilities? The answer is not too flattering, in fact, it is not flattering at all. Considering the amount of effort that has gone into winning the ballot for substantially everybody, surprisingly large numbers make little or no use of it. At every election, many adults, of course, are ineligible to vote because temporarily or permanently unable to meet the qualifications required. But of those eligible, many fail to register, of those who register, many fail to go to the polls, and of those who go to the polls, many vote only for certain offices and not for all. With the highest office in the land at stake, from 15 to 20 per cent of the duly registered voters stayed away from the polls in the four presidential contests of 1928-40 inclusive. The last of these (the Roosevelt-Willkie "third term" battle) brought out a record breaking vote of almost 50 million, yet a quarter of the country's potential voters were not even registered, and of the registered one out of every six neglected to go to the polls.[17]

[15] Except in Nebraska, where there is only one house ... dent, 531 members of Congress

In state and local elections, the proportion of stay-at homes is often twice as large

Reasons The reasons for so much non-voting are many To begin with, no elections are held in the District of Columbia, and more than a quarter of a million men and women are kept from the polls because they have no legal residence




outside of that area Large numbers at every election, especially in cities, are debarred because of not having resided long enough in their state, county, or election district For reasons explained—lack of genuine two-party contests and disfranchisement of Negroes—most Southern states yield an exceedingly small vote Many voters in all parts of the country are prevented from casting their ballots by bad weather, illness, or other legitimate reasons, although it should be observed that, even before World War II prompted extensive new arrangements for voting in the armed services, all but three states had laws

largely removing one serious impediment of earlier days, i e, absence from the voting precinct To some extent, voters are discouraged or thwarted by legal and administrative obstacles—too much crowding at the polls, too short hours for voting, too much red-tape in absent voting, and inconveniences of registration To some extent, they are deterred by the lack of vital issues in an election, by belief that their vote would not affect the result (especially in one party or 'sure" states), by fear that employers or others will find out how they voted, by disgust with politics and parties, or even by contempt for political methods of action in general An obstacle, too, is the "jungle ballot" with which the voter too often is confronted—crowded with names of candidates he never heard of seeking offices he knows nothing about After all allowances are made, however, one is tempted to surmise that the most common cause is no one of these things, but simply indifference and inertia, and an extensive first hand study of non-voting in Chicago, based on the local municipal election of 1923, bears out this opinion [18] Sometimes there is indifference toward a particular election only—a colorless local contest, or even a state or national contest barren of challenging issues and commanding personalities But more often it extends to elections generally, and the Chicago investigation shows it to be especially prevalent among younger voters, in poorer neighborhoods, and among housewives, but only slightly more so among people of foreign than among those of native birth [19]

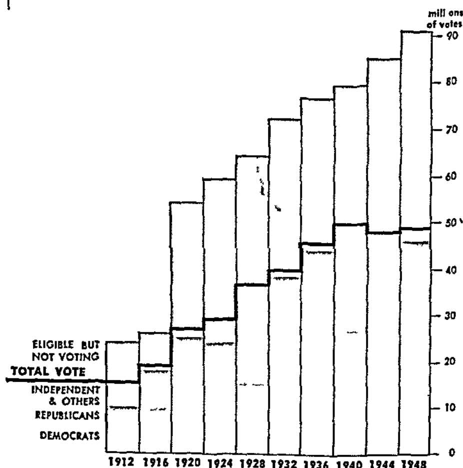
*Suggested remedies*

Whatever the factors involved, the stay at home vote is of such proportions as to stir complaint every time an important election comes around In addition to making the 'first Tuesday after the first Monday in November' a national holiday, shifting the voting day to Saturday or Sunday when most wage earners are not at work and other such expedients, it has been suggested that, as in some other countries voting be made compulsory, although because of our federal system, and for other reasons, the plan would offer serious difficulties, even if it did not run counter to our American notions of personal liberty From one point of view, the slacker vote is given more emphasis than it deserves contrary to a very general assumption, there is no particular virtue in mere numbers of votes Many get-out the-vote efforts begin and end in an attempt to induce men and women to go to the polls, regardless of whether they know anything about the issues or the candidates The thing to be aimed at is not simply voting, but intelligent and interested voting, and energy spent upon getting ballots into the hands of persons who either are insufficiently informed to make intelligent decisions or, although informed, have no clear opinions is misdirected Viewing the problem sanely and soberly, the solution would seem to lie rather in the direction of (1) electoral reforms, such as permanent registration, a shorter ballot in state and local contests, and

[18] C E Merriam and H F Gosnell *Non Voting Causes and Methods of Control* (Chicago 1924)

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## CHAPTER 9

# Public Opinion, Pressure Groups, and Political Parties

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The broad field of politics

Ninety five million men and women actually or potentially endowed with the ballot constitute an enormous reservoir of political power Even such power, however, would merely scatter, frustrate itself, and fail of significant achievement unless harnessed and directed, and we now turn to some of the ways in which the political ideas and energies of our huge electorate are galvanized and channeled into action Other portions of this book are concerned primarily with matters of public law, and with the functions and workings of government as an operating mechanism Here we pause for a glance into the pulsating, often exciting, realm of politics—a term too frequently suggesting mere sordid conflict and manipulation for offices and other spoils, but in its full and proper sense denoting the entire sweep of civic activities associated with influencing and determining public policy It is through politics that the people, under the principle of democracy, express themselves on what they want done and select those of their number to be charged with carrying out the mandates voiced

Channels of political opinion and action

Five main agencies for giving coherence and direction to what otherwise would be only a chaos of separate, discordant, and futile individual wills, and (in most cases) for translating an ascertained collective will into governmental action, can be discerned (1) public opinion, and the instrumentalities by which it is formed and made articulate, (2) groups and associations interested in particular programs or objectives which they seek, by various forms of pressure, to force into the stream of adopted policy, (3) political parties, which synthesize opinions and interests and offer them for collective acceptance, (4) nominations and elections, as means by which the people choose among programs and candidates put before them ordinarily by the parties, and finally (5) organized governments on the different levels, with legislatures, executive officials, and courts placed in power in part to carry predetermined programs and policies into effect, but also, as they go along, to formulate and adopt policies considered consistent with the public will Among these, our concern in this and the following chapter is with public opinion, pressure groups, and political parties, nominations and elections will then occupy us through two chapters, and from there on, attention will be fixed mainly on government in action

## PUBLIC OPINION

1 Nature

Men and women as individuals have opinions on all sorts of subjects—religion, education, literature, art, business, labor relations, sports, most of them have opinions, however shallow or prejudiced, on political matters also And individual opinions shared by sufficient numbers result in what we know as "public opinion" How widely shared such opinions must be is itself a matter of opinion some say that even a slender minority, if articulate and earnest, can determine public opinion on a given matter, others think at least an apparent majority essential But in any case public opinion is a synthesis of more or less harmonious individual opinions with enough backing to give it sanction as a dominating attitude or sentiment

2 Formation

As a factor in the political process, public opinion has of late come in for a good deal of observation and inquiry, by people ranging all the way from rashly zealous "pollsters" to cautious students of social psychology and political phenomena And further questions at once arise How is public opinion on political matters formed and influenced? Through what channels does it express itself? To what extent, and how, can it be measured? Speaking broadly, public opinion in the political sphere is shaped by any and all agencies that influence the attitudes and thoughts of men on public issues Back of all else stand the family, the school, the church, the club, the college and university, the newspaper, the political party, the labor union, and other sources from which the individual draws ideas, often those that (whether he realizes it or not) most dominate him Business connections, employment relationships, and social contacts contribute So do books and pamphlets, magazines, plays, radio-broadcasting, motion pictures, outdoor advertising, and indeed every instrumentality by which information and ideas on public matters are disseminated Systematic propaganda, carried on through channels just mentioned or otherwise, plays a sometimes dominant part Government itself does not hesitate to try, through publications, speeches, and other means, to mold the opinion of the people to its viewpoints and policies Wherever a person goes or whatever he does, he is surrounded by influences, of which he may be but dimly aware, inclining him to one viewpoint or another, one body of doctrine or another, and often to two or more actually contradictory Public opinion is an often invisible, intangible, even elusive, yet also real, collective attitude, or congeries of such attitudes, flowing from daily contacts and experiences of the people

3 Expression

For the student of government, public opinion is significant chiefly for the ways in which it expresses itself and influences public action And most of these are fairly obvious (1) the ballot at national, state, and local elections, when a great uprising of opinion may sweep a set of officers, a legislature, a party, out of power and turn the trend of public policy in a wholly new direction, and when in any case most voters register their agreement with or protest against candidates and policies which one organ of opinion or another has placed before them, (2) use (by ballot also) of the popular referendum,

even though often with negative results, indicating only that a *given constitutional amendment*, piece of legislation, bond issue, or other proposal does *not* reflect the public will, (3) concerted communications (including petitions) addressed to legislators or administrators reflecting views, urging action, sounding warnings, (4) activities in Washington and in state capitals by or on *behalf* of organized groups, at least when representing some widely shared *interest* rather than some merely personal or local objective, (5) editorials in influential newspapers, resolutions adopted in representative gatherings, and other modes of expression having more or less of a concerted and even mass, aspect, and (6) responses made to popular polls, particularly at election time Claims made that a given assertion or position reflects public opinion are, however, often hard to prove or disprove

4 Measurement

The actual volume of public opinion in a given situation or on a given matter is commonly difficult to measure except after some tangible demonstration, an election usually fairly well shows what the state of opinion was when the people went to the polls—although not on all issues, since ordinarily these are crisscrossed in such ways that no single marking of the ballot can serve as an expression all around Public sentiment however, often can be judged with some reliability from sufficiently broad and representative expressions in the press, in meetings and otherwise, and of course recent decades have witnessed the introduction of various types of political polls and surveys designed to arrive, by sampling techniques, at accurate pictures of the mind of the electorate at different stages of electoral campaigns Straw votes were taken by newspapers more than 50 years ago, but the two polls recently best known have been those conducted by the American Institute of Public Opinion (the 'Gallup Poll') and by the magazine *Fortune* (associated with the name of Elmo Roper), both dating from 1935 Formerly, criticisms of the results obtained by these two polls were directed principally at tests of opinion on particular issues or questions, and tests of voter attitudes toward candidates were widely regarded as extraordinarily accurate and even 'scientific' In common with virtually all forecasting agencies, both, however, lost prestige by failing to discover and reveal the late ground swell for President Truman in 1948, and since that chastening experience, professional pollsters have been franker to admit that a long road remains to be travelled before mass opinion can be measured with complete reliability [1]

## PRESSURE GROUPS

1 "Interests" in politics

However far short of unanimity it may fall, public opinion reflects a coalescence of individual wills into a general will, and therefore has a mass or collective aspect Other channels of political expression and influence, however, have their sources in group, class, professional, and regional differences, and consequently tend to division and confusion rather than consensus, and chief among these media of particularized political expression are the multifold and varied agencies known broadly as pressure groups

[1] For a keen and generally skeptical analysis of poll taking as developed to the present time see the work by L. Rogers cited on p 145 below

The animating force in a pressure group is a special interest of some kind, and when one stops to consider how special interests multiply and crisscross in our American society, one can begin to get some idea of the field open for organizations representing them and endeavoring to procure advantages for them Of course, there is a sense in which all of us belong to pressure groups of one kind or another All of us have special interests, arising out of our business or profession, our social connections, our position as consumers, the causes we believe in, the things we feel impelled to resist, and in various ways, *e g* by motivating our voting at the polls, these interests dominate what we do even more than we sometimes realize Members of Congress and of state legislatures represent interests—their own or those prevailing among their constituents, and accordingly we have farm members, labor members, banking members—even "cotton members," "tobacco members," and "oil and gas members" Our major political parties are patchworks of interest groups, often arrayed against one another within the same party, and with managers pushed to the limits of their ingenuity in discovering the greatest common denominator among them and, on the basis of it, cultivating some degree of party unity It is, indeed, chiefly the weakness of internal discipline and control characteristic of our parties that gives pressure groups the wide scope for operation that they commonly enjoy

2 Some examples

Special interest groups pursue their objectives on all levels of government —national, state, and local, and while the number seeking to influence national policy, and specially represented in Washington for that purpose, runs into many hundreds, an even longer list would be found if one set out to count, state by state and city by city, those operating within more restricted areas One almost may generalize by saying that every group and interest having objectives which might be attained, or at least promoted, by governmental action has an organization through which to press its viewpoints and demands

For any enumeration and analysis of special interest groups, even if confined to those operating on the national level, the reader must be referred to books devoted largely or wholly to the subject Only a few groups may be mentioned here Thus in the field of business there are the Chamber of Commerce of the United States and the National Association of Manufacturers, never failing to urge the capitalist, management point of view upon legislators and administrators, and flanked by literally thousands of trade associations serving the interests of individual industries Over against these are the A F L, the C I O, the railway brotherhoods, and other organizations active in all that pertains to labor legislation and to the labor policies and actions of executive and judicial arms of government as well No policy relating to agriculture can be considered at Washington without stirring to action the powerful American Farm Bureau Federation, the National Grange, the Farmers' Educational and Cooperative Union, and perhaps the National Council of Farm Cooperatives The American Bankers' Association has plenty to say about the relations of the Treasury Department and the Federal Reserve System to fiscal and banking practice The Civil Liberties Union watches for laxness on the part of national and state governments in upholding personal

liberties guaranteed by the respective constitutions, and the National Association for the Advancement of Colored People fights the poll tax laws of Southern states and other discriminatory legislation, wherever appearing The National Woman Suffrage Association prepared the way for the Nineteenth Amendment, and the League of Women Voters of the United States pushes vigorously for administrative reforms, national, state, and local, for legislation on many subjects of wide concern, and for a strong policy of international cooperation Millions formerly in the country's armed services make their desires vocal through the American Legion, the Veterans of Foreign Wars, and the American Veterans Committee The National Education Association urges a nation-wide program of federal aid to elementary and secondary schools, and the American Medical Association has of late been throwing its weight energetically against government policies looking toward "socialized medicine"

3 Methods employed

For promoting their objectives, pressure groups rely mainly on (1) organization and financing, (2) propaganda, and (3) lobbying Organization perhaps exists before 'pressuring' is undertaken, if it does not, a group gradually forms around some agreed purpose or program, establishes headquarters, recruits members, appoints officers, raises money, and, while likely enough to disclaim any political intent, more or less openly launches its effort to bend public policy in the direction desired Groups or 'interests" of great size and abundant means, and existing solely to further a given cause mold their machinery entirely to the purpose in hand, as for example, did the now defunct Anti Saloon League Others for whom exerting pressure for a given objective is only subsidiary to their main activity, will at least develop arrangements, perhaps divisions or branches for performing that function Whether a pressure interest will engage in general propaganda depends on circumstances If the objective is one which can hardly be attained without building public support—to be transmitted to legislatures or other agencies having power to act—propaganda through books and leaflets, newspapers, advertising, radio broadcasting, planks in party platforms, and the like, will almost certainly be invoked, in so far as means permit On the other hand, if the objective is such that publicity might have merely the effect of stimulating opposition, effort naturally will be restricted to at least a more limited public, consisting primarily of government officers, members of legislatures, and key people in party organizations In any event, pushing the cause to final success is practically certain in the end to become largely a matter of direct personal contact and persuasion in the form of lobbying—a technique, however, which may best be commented upon later in connection with the law-making process in Congress and in state legislatures [2]

[2] See pp 277 279 and 606 below

## POLITICAL PARTIES—NATURE AND USES

Essential features

However large and influential it may be, no organization like those thus far mentioned can claim to represent the country as a whole, or amass enough power to take over the government and run it The only ones able to do these things are, instead, those which we know as political parties And in saying this we are not thinking of instruments of tyranny, tolerating no rivals yet calling themselves "parties"—Fascist, National Socialist, Communist—such as have held sway under the totalitarian régimes with which Europe has been cursed We refer rather to parties in the truer sense as found in all democratic states The term "political party," as thus employed, is not easy to define, but essentially it denotes some portion of the electorate consciously bound together by adherence to at least some traditional political principles, by common attitudes on at least some public questions, by machinery adequate for at least some concerted effort, and unfailingly by a desire to gain control of the offices, by the peaceful, constitutional means of election, in order that a program conceived in the nation's, as well as the party's, interest may be carried into effect A party may be large or small, national or sectional, harmonious or discordant, tightly organized or not so But more important ones nearly always operate on a national scale, and commonly permeate all levels of government and of society Moreover, in democracies any number of parties may spring up and contend freely with one another, a main characteristic of democracy is, indeed, free party life [3]

Parties criticized and deplored

To be sure, the political party, like many another useful device, has been the object of a great deal of suspicion and criticism, in our own country as elsewhere When, during the presidency of Washington, the people were unexpectedly found grouping themselves, under the leadership of Hamilton and Jefferson, respectively, in rival Federalist and Republican parties, thoughtful men deplored what was going on, and Washington himself was moved, in his Farewell Address, to declare the "common and continual mischiefs of the Party sufficient to make it the interest and the duty of a wise people to discourage and restrain it" Historians used to describe the period from Madison's presidency to that of Jackson as a golden age of "good feeling," for the simple reason that (despite plenty of local and personal political strife) parties had for the time being largely disappeared And after party rivalries again grew vigorous, and especially in the decades following the Civil War, critics and reformers aimed their shafts, not only at rings and bosses and spoils, but at parties themselves as being perhaps the chief public evil of the time Even today, one sometimes hears it charged that party names and platforms mean

[3] For purposes of administering statutes dealing with nominations elections and the like it however becomes necessary to have some fairly definite standard for determining what associations are and what ones are not to be considered parties To this end the laws of a state usually fix as a criterion the polling of some specified percentage of the state's entire vote in a previous election sometimes as low as 2 per cent sometimes much higher A newly formed party ordinarily can get legal recognition (and a place on the ballot) by obtaining a prescribed minimum of signatures to a petition, sometimes (as in Illinois) with a required distribution by counties, and of course a party regardless of numbers, may be debarred by law from participating in elections, as in a number of states the Communist party has been

little, that principles receive mere lip-service, that policies are adopted or discarded mainly with a view to capturing votes, that leadership is bankrupt, that indeed most parties are mere shams

Nevertheless indispensable

Sordid as are many chapters in their history, parties, however, are both inevitable and essential—*inevitable* because the voters of even a city or a county are practically certain to divide on matters of policy and on the persons who should be placed in the public offices, *essential,* because—while so-called nonpartisan elections have proved their worth in jurisdictions of limited area and for the choice of certain types of officials, such as judges—no one ever has been able to show how the democratic process could be operated over a wide expanse like a state or nation except with the aid of party organization and action No other agency for channeling electoral power in large volume and definite direction exists Some people refuse to identify themselves with any party, and, lest such "independents" prove numerous enough to tip the balance against one set of candidates or another in an election, party managers sometimes bid anxiously for their support Under normal circumstances, however, the surest way for anyone to make his weight felt in a political contest is through a party

Some uses served

Viewing the matter particularly on the American scene, parties serve a wide variety of useful purposes

1 They help keep the people informed on public affairs even though their propaganda be one sided they afford voters an opportunity to hear different sides and make up their minds and to learn more than they otherwise would about government and its processes

2 In this way, parties stimulate discussion and opinion, and not only these but also action, since the thing that most often prompts the average voter to go to the polls at election time is party incentive

3 Parties formulate issues advocate policies and put them before the electorate as more or less clarified alternatives

4 They select candidates for the public offices enabling the voters to pool and concentrate their electoral power to some effect

5 They compromise and resolve interest group demands embracing some, turning a deaf ear to others reconciling wherever possible

6 They stand, to some degree, as sureties for the satisfactory performance of official duties by persons elected under their sponsorship

7 They (at all events those out of power) provide watchfulness over and criticism of the conduct of government, a criticism often merely captious it is true, yet on the whole serving usefully to keep the "ins" on their mettle

8 They furnish a harmonizing element in government particularly needed in

serving (to change the figure) as a sort of cement holding together people of divergent race, religion, culture, and occupation throughout the broad expanse of the country

## THE PARTY PATTERN IN THE UNITED STATES

Factors influencing party affiliation

Many attempts have been made to explain why people divide on party lines as they do, and even why they divide at all There is a theory that men are more or less automatically impelled in different directions politically by innate dispositions or qualities of mind, leading some, for example, to become conservatives and others liberals or radicals But this is far too simple not only may the same individual be conservative on some matters and quite otherwise on others, but much that happens in actual party experience is left entirely unaccounted for In the case of the United States, an explanation has been found in the historic issue of strong, centralized government versus states' rights Yet our political history, especially since 1933, shows how easily the same party may, within a brief period, be found on both sides of that question *In point of fact, there is no single explanation* Why are some Americans today Republicans, some Democrats, and others something else? Some because their fathers and grandfathers were such, and they have grown up in the tradition, some because they live in a community or region where it is the normal and natural thing to belong to a given party, some because they believe a given party more friendly to their race or business, some because they think it expedient to go along politically with their employers, some because of deliberate choice grounded upon disinterested belief in a given set of political principles or devotion to a given leader or group of leaders

The economic-sectional basis of American politics

Viewing the developing party pattern over the entire stretch of American history, however, the most competent students of our party phenomena have been almost unanimous in finding the principal ground for party cleavage, not in psychology, nor in constitutional theories, nor in any of the other motivations just enumerated, but rather in interests and reactions of an economic and sectional nature It was on this basis primarily that parties started in the early years of the Republic—the backbone of the Federalist party being the commercial, financial, and industrial elements of New England and the Middle States, that of the Jeffersonian Republican party, the agrarian interests (planters and farmers) of the South and rural North Moreover, in a general way the pattern thus *initiated projected itself down the course of time* in the lineage of Federalists Whigs-Republicans (Hamilton, Webster, Lincoln, McKinley, Theodore Roosevelt, Hoover) and, over against it, that of Jeffersonian Republicans-Democrats (Jefferson, Jackson, Cleveland, Bryan, Wilson, Franklin D Roosevelt)—the one line associated, at all events historically, *with high protective tariffs*, centralized banking, currency based on gold, a large navy, taxes bearing lightly on wealth, strong national government devoting itself to the promotion of commercial, manufacturing, and business interests, the other line associated equally with states' rights, low tariffs, antimonopoly, state banks, "free silver," anti imperialism, graduated taxation of incomes

Even 100 years ago, however, this broad characterization had only rough and approximate validity No one party ever enlisted the undivided support of

any entire economic interest or group or of any entire geographical section, too many other motivations for party alignment cut across economic and sectional lines and blurred the picture From its beginnings, almost a century ago, for example, the Republican party attracted heavy support in the rural and agricultural North, on the other hand, as newer industries arose in the section, they sometimes, for varying reasons, were drawn into the Democratic orbit And today the scene, everywhere outside of the one party South, is confused indeed Economic life has grown infinitely more complex, in capital invested, value of product, and numbers of people employed agriculture has been outstripped by industry and trade, the interests of agriculture, industry, and trade overlap and dovetail in novel ways, sections no longer are so sharply identified with either agriculture or industry—the latter, for example, having extensively invaded the South as well as, of course, the once almost wholly agricultural Middle West And all this has been reflected in the warping and twisting of the traditional party pattern into almost unrecognizable shapes For reasons associated with the aftermath of the Civil War, with the Negro problem and with loyalty to tradition, the South remains a Democratic stronghold But elsewhere—even in once solidly Republican New England—new lines have been drawn, or at least old ones shattered or obliterated Industry, grown huge, is divided against itself, with heavy representation in both parties Democratic hostility to protective tariffs has softened into a program of 'trade agreements,' for which there is also considerable Republican support Farmers are predominantly Republican, industrial laborers predominantly Democratic, but (at least in the former instance) not so decisively as a generation ago World developments over which we had no control have cast the Democrats in the strange rôle of the party of nationalism, strong armies and navies, international intervention, and war, leaving to the Republicans—at any rate for the time being—the less glamorous and rather unfamiliar rôle of advocating caution, restraint, and even isolationism

The picture blurred in later times

Today, both of the leading parties are notoriously conglomerate and disunited Even so, they are not properly to be written off as merely two bottles carefully labeled but empty, as James (later Lord) Bryce asserted of the parties of 40 years ago By and large, they (or predominating elements within them) still stand for some distinctive things—in traditions, attitudes, principles, and policies Cutting through all strata of society, penetrating all geographical sections, enlisting in some degree all economic interests, they, however, must increasingly be all things to all men in order to hold, or hope to gain, power Some significance attaches to polls during the presidential campaigns of 1940 and 1944 showing the Democratic candidates enjoying the support of only a little over one-fourth of the voters in the upper income groups, a little over half of those in the middle group, and seven tenths of those in the lower groups, with the Republican candidates preferred by almost three-quarters, a little under half, and only three tenths of the different groups, respectively This, however, only underscores the heterogeneous nature of both parties and leaves the way wide open not only for sharp differences

The situation today

of view between income groups within the same party, but for the divergencies and conflicts widely existing among geographical, occupational, or other elements within income groups taken individually[4]

The two-party system

Throughout its history, the United States has at a given time had but two major parties From an early day, it is true, dissatisfied elements have launched 'third parties, totaling at least a score. There have been the Anti-Masons in 1826 and after, the Liberty party, appearing about 1840, the Free Soil party, active in the election of 1848, the Native American, or 'Know-Nothing," party which flourished in the fifties, the Republican party itself, which began as a third party in 1854-56, the Prohibition party, dating from 1872, the Greenback party of the seventies, the People's, or 'Populist," party of the nineties, the Socialist party, starting about 1897, the National Progressive party of 1912 the Farmer Labor and Communist parties formed about 1920, the Progressive party, launched by the elder Senator LaFollette, which made an impressive showing in 1924, the Progressive party which existed in Wisconsin from 1934 to 1946, the Farmer-Labor party in Minnesota which in 1944 joined with the Democratic party to form the present Democratic-Farmer-Labor party of that state, the American Labor party and an offshoot, the Liberal party, local to New York State and largely New York City, and of course the [Wallace] Progressive party and the States' Rights ['Dixiecrat'] party which enlivened the campaign of 1948

The rôle of minor parties

Some of these parties too, momentarily attained sufficient strength, especially in pivotal states, to affect the results of a presidential election, and one—the Republican—developed into a major party From 1928 to 1944 inclusive, however, all minor parties combined polled no more than from 0 5 to 2 5 per cent of the total popular vote in any presidential election; even in 1948, with eight minor parties running presidential candidates and one of the number capturing 39 electoral votes, the figure was under 5 5 per cent, and as a rule such parties have found their importance mainly in revealing and crystallizing dissenting opinion (usually on economic and social matters), and as threats to the rather evenly balanced major parties, impelling them, whether they liked it or not, to bid for support by taking up issues and assuming positions calculated to find favor with elements of the population chiefly appealed to by a given third party movement A remarkably large proportion, indeed, of leading party issues in the past several decades were more or less forced upon the major parties in this way Except for occasional "one purpose" parties like the Prohibitionists (and for the States' Rights party in 1948), minor parties almost invariably are some distance to the left of, *i e*, more radical than, the old line organizations, and frequently the internal heterogeneity and conflict displayed by the latter are more than matched by the discord plaguing minor groups—which supplies part of the reason, along with appropriation of their issues by major parties, limited funds, and sometimes inept leadership, why so few third parties achieve much importance, or even survive

[4] The economic and sectional aspects of American parties are dealt with illuminatingly in the books of A N Holcombe listed on p 145 below Cf D D McKean, *Party and Pressure Politics* (Boston, 1949), Chap iv

Advantage of but two main parties

Although there are those who would disagree—particularly on the ground that the existing two parties are too much alike to offer the voter much actual choice—the United States profits greatly by having only two major parties The sole alternative in a democracy is a multiple party system But the experience of France, of Germany between 1919 and 1933, and of other countries, warns loudly against that With us one party normally is in power at a given time (in state or nation or both) and bearing responsibility for what is done or not done—with the other standing ready to take over and to assume similar responsibility whenever the people so decree In the typical situation, there is (at least in theory) power to govern, and to the American way of thinking that is more important than separate representation for a variety of political elements, no one of which would be likely ever to attain power except as shared with rival elements in a precarious coalition [5] Herein we have the main reason why proportional representation, although finding favor in a few cities, has never commended itself for use on national and state levels

Party membership

Mr A may avow himself, or be understood to be a Democrat, Mr B a Republican, Mr C a Socialist, and this is taken to mean that they are 'members" of their respective parties Party membership in this country is, however, for most people a rather vague and elusive matter A person 'belonging" to almost any other sort of association—a church, a lodge, a professional society—expects to join by some positive act, to take an oath or pledge of allegiance to some creed or body of principles, to make contributions or even pay "dues,' to be governed by a set of regulations, perchance to serve on committees, hold offices, and otherwise participate in the organization's work Minor political parties, too, being recruited usually from people having a missionary zeal for some program or cause, tend to more or less tight organization of the kind, at all events, they (the Communists, for example) sometimes have a regularly enrolled membership subscribing to certain principles and objectives and pledged to contribute to the party fund Of the major parties, however, nothing of the kind can be asserted They have no procedure or ceremony of 'joining" (except as one may join a political club or other such auxiliary), they have no general roll of members, but only such lists as result, in less than half of the states, from pre primary enrollments, supplemented by lists compiled by local managers, they get no signatures to their programs of policy, they collect no dues (though efforts sometimes have been made to institute a system of regular contributions), they enforce no rules, they have no means of disciplining a 'member" or expelling him—

[5] "Power to govern is of course in practice qualified and at times almost nullified by discord among the different factions wings groups *blocs* and interests which a major party [illegible] must *sweep together* in order to maintain itself and resulting de[illegible] are so serious as to have led a recent keen

except as he may be disciplined by failure of support if he chooses to run for office

Circles within circles

The picture that one gets is that of a series of concentric circles At the center is a core of party officers, organizers, voluntary and paid workers, public office holders, office seekers, corporation attorneys, partisan newspaper editors, persons receiving or hoping for favors at the party's hands—in other words, people who not only are Democrats or Republicans, but 'work at it' Outside of this is a far wider circle containing people who, without being active workers, nevertheless are regular adherents, in that they consistently go along with the party, register as belonging to it, vote for its candidates, join clubs affiliated with it, at least now and then help meet its expenses, and in general give it the weight of whatever influence and prestige they may have in their communities Still farther out is a circle of "in and out-ers"—people who commonly go along yet often disagree, criticize, vote for opposition candidates, and otherwise prove undependable And finally there is a wide periphery of voters who, even though at times giving active support, do not accept the party name at all and are rather to be classed as *independents* In the election of 1948, Harry S Truman polled 24,104,836 popular votes and Thomas E Dewey, 21,969,500 But this does not mean that the two parties at that time had these respective numbers of *members* It means only that the given numbers of votes were amassed *from all sources*, some Democrats voting for Dewey, a good many Republicans for Truman, and doubtless still larger numbers of independents for one or the other as they chose, and of course the figures take no account of the masses of non-voters One is a Democrat or a Republican if he says he is (for example, when registering as a voter, or when challenged at a closed primary), or at any rate if he consistently supports the one party or the other, and that is all there is to it Furthermore, he may change his mind and allegiance as often as he wishes How many "members' either party has at a given time is anybody's guess—and still would be even if there were more trustworthy criteria for determining who is to be regarded as a 'member" and who is not

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# CHAPTER 10

## Party Organization and Finances

Legal status

Important as they are, political parties have developed in the United States with but little constitutional recognition the national constitution has not a word to say about them, and most state constitutions are equally silent except as 17 of the number indirectly authorize them by empowering them to make certain nominations or in other ways For 100 years, too, parties were but little regulated even by statute Although long an arena of party combat, Congress passed its first law directly affecting them as late as 1907, and state laws dealing with their membership, organization, activities, and finances—although now voluminous—commonly are of even more recent origin Over the years, enough federal and state regulation has accumulated to invest parties everywhere with a public status Nevertheless, they remain not only purely voluntary, but to a large extent autonomous and self-sufficing Their activities go far toward making federal and state governments function as they do But they are not themselves government organs Legally, their position is that of unincorporated non profit associations, with no personality apart from the individuals who compose them, and therefore incapable of suing or being sued, owning property, making contracts, or receiving bequests except through individuals or groups representing them [1]

### PARTIES AND THE DIFFERENT LEVELS OF GOVERNMENT

Another characteristic of American parties is their tendency to permeate all levels of government Although with little strength in some sections, both major parties and some minor ones have nation-wide followings, with national programs, officers, committees, platforms, candidates, and treasuries, and a Democrat or Republican thinks of himself primarily as identified with a national party Major parties, however, also are organized and function in states and their subdivisions, downwards to townships, villages, wards, and precincts, and they seek to capture not only the presidency and Congress, but governorships, legislatures, county boards, sheriffs' offices, mayors' offices, city and town councils, township trusteeships—in short, elective bodies and positions all the way up and down the scale In the public eye, state and local

[1] J R. Starr 'The Legal Status of American Political Parties *Amer Polit Sci Rev* XXXIV, 429-455, 685-699 (June and Aug., 1940)

politics usually are overshadowed by national But the politician sees things differently He knows that in many respects state and local politics are the more important

Importance of the state level

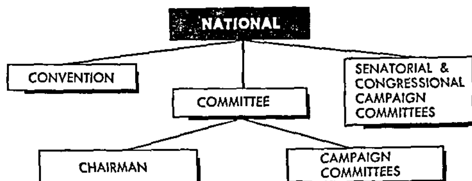
For just as under our federal system the states are the primary reservoirs of governmental authority, so under it, too, the basic constituent elements of a major party are *state* parties, loosely federated over the country into national parties and, within their respective areas, ramifying downwards into the localities It is in the states that the basis of political power is supplied by the electorates It is there that political leaders are developed and that professional politicians, commonly find their livelihood in public office It is there—most often in cities—that bosses and machines arise and flourish And it is there—especially in counties and cities—that party organization usually attains its maximum of detail and efficiency When a national party picks a candidate for the presidency, it frequently settles upon the governor of some state, and the convention that nominates him is a conclave, not primarily of national political leaders, but of state leaders and other state representatives, sent and instructed by, and acting in the name of the politicians and peoples of their home states Moreover, while after a president is in office, he may reach down into the states and by use of his patronage and in other ways exercise a good deal of political influence, he runs risk of coming up sharply against situations which he cannot control as, for example, when in 1938 President Roosevelt undertook to prevent various anti New Deal Democrats from being reelected to Congress Members of Congress, on their part, are chosen in states, by state defined electorates after state campaigns, and (whatever may be the theory to the contrary) as representatives of the people of states or their subdivisions All in all, state and local politics supply the indispensable underpinning of national politics, no party can hope for success on the national level unless it is strong in many states and dominant in some

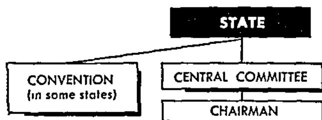
Separating state *and local* politics from na*tional*

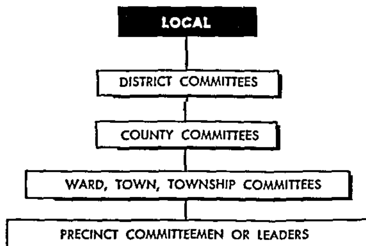
Operation of the same parties on all levels has at least some slight tendency to bring federal, state, and local governments closer together, and therefore to promote national unity It also, however, projects national politics into state and local affairs in ways which to many people seem undesirable, and in numerous states steps have been taken to break the traditional national-state political tie up One method rather widely employed has been to place state and local elections, so far as practicable, in intervals between national elections, with the idea that this will enable state and local issues to be considered on their own merits, even though candidates continue to run and be elected as Republicans, Democrats, or Socialists Going still farther, other states have adopted for state, or at least authorized for local, elections a nonpartisan type of ballot bearing no party emblems and no indication of the party affiliations of candidates, and many municipal officers and judges of state and local courts, together with some state executive officials and the members of the legislature in Minnesota and Nebraska, now are nominated and elected in this way

Where the nonpartisan ballot has been adopted, it generally has been assumed that influence from national parties will be eliminated, or at any rate

## THE FRAMEWORK OF PARTY ORGANIZATION



reduced to a minimum, and in many instances this has been the result, especially in relatively small communities. In states or large cities having national party machinery operating the year around, however, the outcome often has been different. In such situations, party organizations usually can contrive to get on the ballot the names of persons whom they especially favor, with the word passed around—sometimes publicly, at other times in whispers—that such and such men are the "organization" candidates, and with the result of almost as much partisan voting as if partisan labels were openly used. Too great hope of regenerating state and municipal politics must not be staked upon the mere removal of party labels from the ballot.

## STATE AND LOCAL ORGANIZATION

Millions of adherents scattered widely over the country and preoccupied with their personal affairs would be helpless to achieve any of the purposes for which parties exist unless organized, and every party meriting the name has machinery—officers, committees, conventions, and the like—to hold its members together, stir them to action, raise funds, carry on propaganda and recruiting, and guide the party effort in primaries and elections. So extensive, indeed, has this machinery grown that in each of the leading parties it enlists (on all levels) from 150,000 to 175,000 men and women, most of them making politics a profession or at least a major avocation.

Primary aspects

The resulting system, too, presents three aspects commanding instant attention. (1) In any given state, party organization, in so far as publicly regulated at all, is controlled almost entirely by the electoral laws of the state itself—usually forming a portly volume (in New York 764 pages) which very few citizens ever have the patience to read. (2) The pattern of organization, the country over, is fairly uniform, its characteristic feature being a pyramid of committees—ward or town, county, district, state, and national—with usually one for each area in which officers are elected, and composed of one or more representatives from each subdivision immediately beneath. On whatever level, committees invariably have a chairman, often a woman co-chairman, frequently a few more or less nominal vice chairmen, and, if large, usually an executive committee, with perhaps committees on finance, publicity, and such matters. (3) Organization is very loose, in the sense that each level of the committee structure is almost entirely self contained, with neither committees nor their officers on one level having any actual control over committees or officers farther down. National committees, having readier access to funds, may pass along sinews of war to state committees,[3] but they cannot dictate to such committees, no more can state committees dictate to county or other local committees. In other words, there is no flow of authority either up or down the scale—no genuine integration. In English parties, the situation is completely different. But our federal system, our sectionalism and

localism, our separation of powers, and our rigid allocation of spheres to all governments, national, state, and local, result in a good deal of autonomy on every level, leaving parties highly decentralized.

**The local level**

**1. Precinct committeemen**

Elections are won or lost at the grass roots, and there—in the voting precinct—is where party organization properly starts; there, too, quite possibly, is where defective organization cost the Republicans the contest of 1948. From 130,000 to 140,000 of these primary units or cells dot the country, each with usually 500 or 600 voters, and in most of them will be found, for each party, a leader, captain, or committeeman (occasionally an actual committee, but commonly only a single official), perhaps appointed by a higher party authority but more likely chosen by the precinct voters in either a caucus or a primary.[3] Parties are victorious when enough precinct committeemen get to the polls enough people who vote right, and to that end these humble functionaries (really the key men in the party machinery) work tirelessly, not merely at election time, but *all* of the time—cultivating the acquaintance of new residents, passing out jobs and favors, distributing relief, encouraging the naturalization of aliens, helping voters with registration formalities, sounding out voter sentiment, distributing party literature, and in general getting all possible returns for whatever money the higher-ups send down to be spent in the precincts. Hard headed realists that they are, with little interest in theories or issues, their business is to keep their districts in line for the party and "deliver" it on election day.[4]

**2. County committees and chairmen**

Ascending the scale, one comes to wards, towns, townships, villages, and similar units, each usually having a more or less active committee. The next important party agency above the precinct committeeman is, however, the county organization. Besides a convention in counties where authorized by law, such organization almost invariably consists, for each party, of a county committee and a county chairman, the former, like the convention (if any), composed of representatives from local subdivisions, the latter chosen commonly by the committee but sometimes by convention or even in a primary. On his own level, the county chairman stands out as does the precinct committeeman on a lower one, although for somewhat different reasons. He, too, promotes the interests of his party in every possible manner, and, with the county a significant electoral unit, it falls to him to take a leading part in making up the party's slate of candidates for such offices as sheriff, clerk, and treasurer, and also for seats in the state legislature, whether filled from the county as a whole or from subdivisions of it. As a rule, he also has much control over patronage, not only in the county service, but including state, and even federal, appointments made within his jurisdiction. In plenty of instances, he may fairly be termed a county boss.[5]

On the state, as on the county, level, party organization consists primarily of a committee and a chairman. In earlier days, the supreme party authority

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in a state was a convention elected, in counties or other areas, by the party voters directly or in local conventions For most practical purposes however, the state convention has now lost its importance In nearly all states the direct primary has supplanted it as a nominating device, and where it survives at all, it usually does so only as a pale image of its former self in the shape of some sort of party council or caucus convoked to choose party officers and prepare a party platform State committees vary greatly in size, and their members are chosen in different ways Occasionally, they consist simply of all county chairmen in the state But usually they are elected directly or indirectly by the voters in counties or other units of representation, with the trend strongly toward direct choice through primaries and often with men and women elected in equal numbers As would be surmised functions include maintaining effective organization throughout the state, adjusting dissensions, promoting the election of party candidates (in cooperation with the national committee in presidential years, with congressional committees when congressmen are being chosen, and at all times with county and other local committees), raising funds, occasionally picking candidates for certain minor offices, sometimes preparing the party platform and in some states selecting the state delegation to the national nominating convention With committee membership often far too large to permit of effective collective action, tasks tend to fall into the hands of a smaller executive committee and especially of such officers as the chairman and treasurer

The state level

1 State central committees

The state chairmanship is a post much sought after by politicians and often bitterly fought over by rival party bosses or factions The state central committee commonly elects, from its own membership or otherwise In doing so, however, it may merely ratify a choice already made by the party nominee for governor or even by a state boss, the chairman in the latter case usually becoming merely a puppet directed from behind the scenes In any event, the dominating figure in party affairs may be the governor or a United States senator Overshadowed in these ways or not, the chairman, presumably working with the state committee, is at least nominally the principal director of state wide party campaigns, with some authority in making up state wide slates and, in the event of party victory, usually sharing liberally in dispensing patronage, both state and federal [6]

2 State chairmen

## ORGANIZATION ON THE NATIONAL LEVEL [7]

Such, in general outline, is the party machinery found, with variations, in every one of the states But the president and vice president and members of Congress are to be elected also, and party organization is required on the national level as well, even though state and local organization is considerably more vital to party strength and success

1 Senatorial and congressional campaign committees

Pursuing the ascending order thus far followed, one finds first among national agencies two committees of which as a rule the public hears little—(1) a senatorial campaign committee, composed usually of six or seven United States senators chosen by the party group in the upper branch and *charged with promoting the election or reelection of the party's senatorial* candidates in the biennial contests, and (2) a corresponding congressional campaign committee consisting in the case of the Republicans of one member of the House of Representatives from each state having a Republican delegation, and in that of the Democrats, of one member from each state having a Democratic delegation, plus an outsider designated by the chairman for each state not having Democratic representation, plus also a woman member from each state in so far as the chairman chooses to designate such Upon the opening of a presidential contest, these two committees place any resources they may have at the disposal of the national committee (with which, however, they have no organic connection) and become its close allies, foregoing much of their normal initiative, even in what concerns the election of senators and representatives After all, in "presidential years" practically all elections follow the fortunes of the contest for the presidency But in "off years" the committees play a more independent rôle Relying, of course, upon the cooperation of national, state, and local committees, they then have entire charge of the senatorial and congressional campaigns, and in meeting this responsibility they distribute political literature, maintain speakers' bureaus, raise and disburse money (giving special attention to doubtful states or districts), and often intervene to smooth out local factional differences

2 The national convention and its agencies

To the very top, party organization is almost entirely a matter of committees and their chairmen At that point, however, the situation changes, because whereas on the lower levels party conventions have largely been displaced, the supreme organ of the national party still is the national convention, not only nominating its candidates for the highest offices and formulating its platforms, but controlling its organization and rules, or "constitution" With the national convention soon, however, to be given attention in connection with presidential elections,[a] we need here take note only of two arms or agencies serving it during the long intervals between its quadrennial meetings, *i e*, the national committee and the national chairman

(a) The national committee

The national committee consists of two party members—a man and a woman—from each state and territory, in form elected by the convention on proposal of the respective state delegations, although in 29 states actually chosen through primaries or conventions, and in such cases merely confirmed at the national gathering During the four years for which it is chosen, *i e*, from one convention to the next, a national committee may most of the time be in a state of suspended animation—almost its only evidence of life being a permanent headquarters with a skeleton staff, including a publicity bureau When, however, a presidential election is at hand, there is much for it to do It decides where the convention shall be held and makes the necessary local

[a] See Chap 12 below

arrangements, it compiles a temporary roll of delegates, which governs unless and until upset at some point by the convention's credentials committee, it selects the convention's temporary officers, including the temporary chairman, who delivers the keynote speech except as expressly authorized by the convention, it may not make or amend party regulations, but it may recommend such for convention adoption These things done, and the convention over, an old committee expires But a new one takes its place and at once faces responsibility for giving the coming campaign all possible impetus [9]

(b) The national chairman

The important figure at this point becomes, however, the committee (or 'national') chairman, he will be the active campaign manager, and consequently in choosing him the new committee will settle automatically upon whatever person the presidential candidate personally wants for the job—quite possibly the man who has managed his pre nomination race If under the chairman's direction the campaign proves unsuccessful, he may retain his post for a time, but will gradually fade from view If, on the other hand, victory crowns his efforts, he is likely to remain the president's confidant and right hand man politically, perhaps stepping into the cabinet as postmaster general, in any case dispensing much of the patronage still remaining to the chief executive, and in the public eye perchance rating second only to the president himself as a political figure [10]

## PARTY FINANCES—CORRUPT PRACTICES LEGISLATION

To maintain party organization carry on propagandist and other activities, and wage campaigns requires money, and usually a great deal of it, save for a vast amount of voluntary unpaid service rendered by the loyal, it would require even more than it does There have been instances in which too liberal use of funds backfired against a candidate or a party But no party management ever thinks it has money enough, or relaxes its efforts to get more, indeed the first, and often the principal, task of many party committees is to raise funds, chiefly for use in campaigns As a rule, the burden devolves primarily upon the treasurer of a national or other committee concerned, although in states and localities it may be assigned to a director of finance, perhaps associated with a committee on ways and means, and such officials commonly leave no stone unturned in their search for the 'sinews of war," appeals going not only to people of wealth, but to any and all party ad-

[9] A person unfamiliar with political realities might suppose that the national committee would ... a good deal of party leadership These things ... gregation of state political figures ... ntly and as a body functioning ... hing to building and maintaining ...'s sorely need ... on meet at least once between

herents who might respond Money is only one factor in winning elections, but it is important enough to be likely to tip the scales when two parties or two candidates are otherwise rather evenly matched

Recent levels of expenditure—presidential campaigns

If they are to remain going concerns, parties must spend money all of the time Their outlays attaining highest levels and attracting most attention are, however, naturally those incurred in connection with campaigns, and it would be interesting if figures could be compiled showing precisely what such outlays are There are, it is true, certain figures As indicated below, party organizations engaging in national campaigns are required by law not only to stay within a specified maximum, but to make full reports on their financial operations, both intake and outgo, and various states also require reports There is, however, the difficulty, on the national level (and often something like it on the state level as well), that the regular channel for party expenditure on a campaign *i e* the party's national committee, is by no means the only one through which money contributes, directly or indirectly, to the campaign's support, state and local committees also spend money which at least indirectly assists the national effort, and, especially of late, all sorts of voluntary, unofficial committees and organizations raise and spend even larger sums With quite possibly as much again actually spent as was reported, Republican outlays on the presidential (and congressional) campaigns of 1928 to 1936 inclusive touched a high of $14 2 million, and Democratic outlays of $9 2 million (both in 1936) With new legislation on the statute-book limiting a national committee's outlay in any calendar year to $3 million, the figures for the two parties, respectively, fell in 1940 to $3 4 million (including old bills cleared off) and $2 8 million, in 1944 to $2 8 million and $2 million, and in 1948 to $2 7 million and $2 3 million Counting in, however, what went for the same purposes from state committees, voluntary groups, and individuals (exclusive of local committees), the figures for all three years, and for both parties, became roughly equivalent to those before 1940, and no one supposes that even these covered everything[11]

Why expenditures are so large

Many people contemplate such outlays with apprehension, wondering whether money in politics has not become a menace to our democratic institutions, and rival party organizations, or candidates, especially if blessed with less ample resources, habitually take advantage of this popular concern and loudly denounce the "slush funds" of their opponents In a country as large, and with an electorate as huge, as ours, however, campaigning on a national scale cannot be other than "big business", and any fair minded person looking into the realities of the situation will discover that it takes only one or two items of a perfectly legitimate nature, *e g*, radio-broadcasting, to account for an outlay of a million dollars or more When all entirely proper objects of expenditure—radio, television, stationery, printing, postage, clerical aid, travel, rentals, newspaper and billboard advertising—are duly listed and footed up, it is not difficult to understand why, in spite of searching investigations by

[11] For full analyses of national campaign expenditures in all presidential elections from 1932 to 1944 inclusive see articles by L. Overacker in *Amer Polit Sci Rev*, XXXVII 769 783 (Oct., 1933) XXXI 473-498 (June 1937) XXXV, 701 727 (Aug 1941) and XXXIX 899 925 (Oct, 1945) also the same author's *Presidential Campaign Funds* (Boston 1946)

Senate special committees in connection with the big outlays in every presidential campaign from 1920 to 1948 inclusive, almost no evidence has come to light justifying suspicion of extensive corruption in the national politics of recent years

Sources of party funds

Whence come the funds with which to meet party outlays on the present ever-rising scale? Speaking broadly from anybody who can be induced (or coerced) to give Party officials and candidates and party office holders are, of course, expected to dig into their pockets Contributors during recent campaigns are circularized and invited to help A decade or so ago, widely heralded efforts were made, especially by the Democrats, to get the general rank and file to manifest interest by contributing a dollar apiece, or some similar small amount The results never were impressive, although in both parties a good many members do give something (rarely very much) from general desire to see the party, or perhaps a favorite candidate, win

All this, however, would not carry a major party far toward the vast sums required And, by and large the money comes in more generous amounts, from people who have, or think they have, something at stake (usually some business or other economic interest), and these are the "prospects" on whom the party treasurers and members of finance committees concentrate in their money-raising drives On the ground chiefly that they are custodians of funds belonging to people of different parties or of no party, banks and other corporations are forbidden by law to contribute But this does not stand in the way of gifts by officers, directors and stockholders, acting as individuals Likewise, and at least partly on similar grounds, labor unions, since 1943, have been forbidden to contribute But this does not prevent donations by officers and members individually, nor indeed expenditure of impressive sums by auxiliary organizations like the C I O's Political Action Committee

Raising and spending money for winning elections can have undesirable results among them domination of parties and candidates (and consequently of government itself) by wealth and special interests, and both nation and states now have "corrupt practices acts," regulating contributions and expenditures as well as other political activities Such laws, indeed, have been a principal means by which parties have been brought within the orbit of state, and to a more limited extent, federal statutory control

State regulation

The corrupt practices legislation of 48 states is far too diverse to be described here Suffice it to say (1)
inherently corrupt, such as bribe
of voters, stuffing of ballot boxes, and tampering with voting machines, and (2) that it usually covers most phases of party finance, including acts (e g, making contributions) not by nature corrupt but becoming improper when and to whatever extent prohibited by law Thus about three fourths of the states forbid contributions to party funds by banks and other corporations, and about one fourth outlaw assessments of officeholders Nearly all restrict the amounts that individual candidates may spend or that may be spent in their behalf A few have gone so far as to place a ceiling on total expenditures by state committees And about three fourths require both candidates and

parties (elsewhere candidates only) to file statements of campaign receipts and disbursements, either before or after an election or both Situations coming to light here and there, however, confirm the impression of most informed persons that such state regulations largely fail, the country over, to correct or avert the evils at which they are aimed

Federal regulation

Regulations imposed by Congress, and applicable, of course, only to campaigns and elections involving the choice of president, vice-president, senators, and representatives, may be summarized under four heads

1 *Limitations on the raising of money* Under federal civil service law, persons on the federal payroll may not be solicited for contributions for political purposes by any officer or employee of the government An act of 1907 forbids any national bank or other corporation organized under national law to contribute to any campaign fund whatsoever, and also makes it unlawful for any corporation (organized under state law) to contribute to such a fund in connection with the election of president, vice-president, senators, or representatives The War Labor Disputes (Smith Connally) Act of 1943 extended these restrictions to labor unions, and a few days before that measure expired by its own terms in 1947, the Labor Management Relations (Taft Hartley) Act more than took up the threatened slack by prohibiting, under severe penalties contributions or *expenditures* by labor unions (along with banks and corporations) in connection with not only federal elections, but all primaries, caucuses, and conventions held in connection therewith Finally, under a Hatch Political Activities Act of 1939, as amended in 1940,[12] no individual committee, or association may donate more than $5,000 in any calendar year to the campaign of any candidate for a federal office, exclusive of any contribution to a state or local committee

2 *Restrictions on amounts that may be spent* Applying to elections only, and not to primaries the Federal Corrupt Practices Act of 1925 [13] limits the expenditures of a candidate for the Senate to $10,000 and of a candidate for the House to $2,500 unless a lower maximum is fixed by law of the candidate's state, in which case that law governs A candidate has a right, however, to the benefit of an alternative rule under which he may spend up to three cents per vote cast for all candidates for the given office in the last preceding general election, with a maximum of $25,000 for a senatorial candidate and $5 000 for a candidate for the House One other restriction, found in the amending Political Activities Act of 1940, is that no "political committee" operating nationally may receive or expend more than $3 million in any calendar year [14]

3 *Limitations on the purposes for which money may be spent* State laws on this subject usually are quite ample, but federal restriction does not extend much beyond prohibition of the more obvious types of corrupt practice, indeed in limiting amounts of expenditure, the law expressly exempts outlays of candidates

[12] 54 U S *Stat at Large* 767

[13] 43 U S *Stat at Large* 1073

[14] At their very first test (in the campaign of 1940) both the $3 million and $5 000 rules proved weak reeds on which to lean The national committees it is true kept under the $3 million ceiling Yet actual expenditures ran measurably close to the highest ever known What happened was very simple and without a word in the new legislation to circumvent it On both the Republican side and the Democratic all sorts of new "committees" "clubs" "associations" and the like—some of them loudly proclaiming themselves non political —sprang up and raised funds which they independently poured into the respective campaigns supplementing the efforts of the national committees and helping push the campaigns with full vigor while enabling the committees to keep their expenditures within the law While as for individuals—having contributed or loaned up to the permitted $5 000 to a national committee they then made further contributions to the miscellaneous organizations mentioned, or to one or more state committees, which thereupon used the funds to take care of expenses previously assumed by the national committee The same things happened in 1944 when organizations separate from the national committees accounted for even larger proportions of total outlays and the record in 1948 was similar

on travel, subsistence, stationery, postage, circulars, telegraph and telephone service, and for 'personal' items thus leaving sizable loopholes

4 *Requirement of publicity* This takes two main forms First, every candidate for the Senate or House is required to file with the secretary of the Senate or the clerk of the House, as the case may be, both before and after election a full report of all contributions received in support of his candidacy, and an itemized statement of expenditures Second, all party committees (and likewise all other committees, organizations, and associations which receive donations or spend money for political purposes in two or more states) must under oath make full periodic reports of their financial operations At no time however, has this latter requirement been very adequately enforced The reports of many organizations (if submitted at all) are casual and unsystematic, and even when otherwise, little actual publicity as a rule is given them

**The problem of improvement**

Aside from the prime question of how parties in this country can develop greater unity and responsibility, the most important present problem relating to them is that of how their financial operations can be more effectively controlled, and it is a problem of very great complexity and difficulty Parties must have money, under twentieth-century conditions (and especially under present inflationary levels of prices and costs), they must have far more than ever before, needs will continue to grow, even now, parties could wisely spend more than they do in educating the voters, stimulating interest in public affairs, and encouraging capable but modestly situated persons to engage in political activity Yet at every turn abuses of money raising and money-spending startle the observer For a certain amount of improvement, it is possible to look to a general tightening up of existing laws On the national level, for example, Congress well might extend the provisions of the Corrupt Practices Act to cover primaries, and it might at least try to bring under control the outlays incurred *for* a candidate as well as *by* him

**Proposal for public financing**

In a different direction some see merit in the occasional suggestion that parties have enough significance for the general welfare to justify making their expenditures a charge upon the public treasury President Theodore Roosevelt advanced this idea as long ago as 1907 In 1910, Colorado actually undertook such an experiment, although, on the ground that the law as drawn was unfair to minor and to new parties it was declared unconstitutional More recently, ex Senator Carl A Hatch, chagrined by the miscarriage of the legislation with which his name is associated suggested limiting the outlay of every party in a national campaign to $1 million, with the national government furnishing the amount It is not to be forgotten, of course, that over the years government already has moved some distance in this direction, not only by taking over all costs of elections and later of primaries (once borne largely or entirely by parties or candidates), but, in Oregon, and for a time in four other states, by printing and distributing to all voters "publicity pamphlets" bringing together the arguments and appeals of all parties participating in given campaigns—with proposals sometimes heard that, during each campaign, all candidates, at least on state and national levels, be allowed free mailing of one such document or other communication to all voters within their area Anything short of complete government financing of national and

state campaigns, however, would leave difficult questions unanswered, and, in turn, questions raised by any such program of financing would perhaps be even more numerous and baffling What, for example, *is* a national campaign, and precisely what activities are to be regarded as embraced, in it? Could a party be expected to finance such an effort on only $1 million—or, so far as that goes, on double that amount? Certainly it is not done now What would be the situation in case of a party split like that of 1912? Can private organizations and groups ever be prevented from raising money and spending it on campaigns? If they cannot, is it worth while to try to fix ceilings at all?

Lack of deep popular concern

Probably in time there will be new legislation But it hardly will look to the subsidy plan as a main or full solution The truth is that while corrupt practices acts have at least done the service of calling public attention to the problem, the subject is not one on which the people at large feel strongly They like showy campaigns, it takes big money to run such campaigns, and though lip-service be paid objectives such as those sought in the Hatch legislation, there is no deep popular concern about curbing lavishness on the part of either givers or spenders able to practice it In default of such concern, regulations with teeth in them will be difficult to enact, and still more difficult to enforce Over the years, many highly desirable restraints upon the collection and use of money for political purposes have been imposed, and some of them are reasonably well observed Progress beyond the points thus far reached, however, will be slow and difficult, even with more agreement than we now have upon precisely what would constitute progress

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## CHAPTER 11

# Nominations and Elections

Political parties in a democracy serve many purposes, and certainly among them is that of providing channels through which candidates for public office can be agreed upon, programs of public action formulated, and both candidates and policies urged upon the voters who make the final choices at the polls From voters and parties, we therefore naturally turn to nominations and elections—to the points in our system where the stored up political power of the people is brought to bear most directly in controlling their governments

### CONSTITUTIONAL AND STATUTORY REGULATION

1 By the states

Like other party activities nominations and elections are regulated principally by the states In the case of state and local offices such control—administered usually through a state election board or the secretary of state—is practically exclusive Congress does not interfere, save as regulations relating to the choice of officials on the national level may incidentally affect the selection of state and local officials at the same elections, and local governments commonly have only the function of administering election laws rather than making them, except that cities under home rule systems usually have a right to enact electoral ordinances for themselves, including provision for special devices like proportional representation if desired In point of fact, national, state, and local elections, while technically distinct, are in practice inextricably bound together the voters in all are the same people, to a large extent, the elections are held at the same time, and as a single procedure, and even the choice of presidential electors and the nomination and election of members of Congress are in most respects governed by the states (with the regular state electoral machinery employed)—as also, in many states, is the selection of delegates to national nominating conventions and of mem bers of party committees

2 By the national government

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as applying to federal elections, and already, by judicial construction, they are debarred from maintaining or tolerating white primaries Although, too, the

[1] See text in the Appendix

times, places, and manner of electing senators and representatives are regulated primarily by state legislatures, Congress may make or alter regulations so made,[2] and under this authority it has ordained not only that senators and representatives shall be chosen on the Tuesday after the first Monday in November of every even numbered year[3] and presidential electors every fourth year but also that representatives shall be chosen by secret ballot (voting machines are construed to be tantamount to the same thing) and—in earlier laws though in none today operative—by districts except in the case of congressmen at large. Congress, in addition has legislated against corrupt practices, and made other practices illegal, in elections in which federal officials are chosen including limitations on campaign contributions and expenditures. The general principle emerging is that the states have full power over federal and state elections alike except in so far as federal constitutional or statutory restrictions are imposed, and it is significant that not even the complications associated with voting in the armed services during World War II resulted in any expansion of federal control over presidential and congressional elections—much less anything approaching a single, uniform federal ballot. Legislation of 1944 and 1946, indeed, newly emphasized the basic jurisdiction of the states over the electoral process.

## THE NOMINATION OF CANDIDATES

Significance

In small communities and for purely minor positions, one may go before the voters, and yet hope for election, merely by formally declaring his candidacy, *i e* by "filing." In places of size, however, and for practically all offices on higher levels, he is likely to find it essential first to be selected (at least by petition)—in other words, to be "nominated."[4] Moreover, whether a state or a county or a city gets honest and efficient elected officials depends almost entirely upon the quality of nominations made. It is a pity that, with nominations now so largely determined directly by the people, voters do not attach more importance to this stage of the electoral process. Regarding it as only a preliminary skirmish, half or more usually stay away from the polls. Yet if they are not to be confronted at the final election with choosing among two or three equally poor candidates for a given office, the time to act is when nominations are made and the range for choice usually is fairly wide. Once the election is reached, they must take or leave whatever the parties put before them.

Nominating methods

The earliest regular device for choosing candidates for principal state offices, and also for Congress, was the legislative caucus, each party delegation in the state legislature canvassing the matter in conference when an election approached and deciding upon a slate of candidates to be "recommended" to the voters. Already, however, there had arisen a caucus of different nature—a more or less informal, sometimes secret, meeting of local party leaders

[2] Art. I, § 4, cl. 1

[3] For the exceptional case of Maine, see p. 203, note 17, below

[4] On the highest level, however, Henry A. Wallace in 1948 became a recognized candidate for the presidency even before his Progressive party was organized

for selection of candidates for offices in townships and cities Frequently, too, these gatherings named some of their number to confer with representatives of similar caucuses in choosing candidates for county offices or for offices in larger areas, and eventually it became the customary thing for delegates to be chosen in local caucuses, in accordance with some agreed plan of representation, to attend city, county, or district nominating conventions The next step was the gradual displacement of the legislative caucus by a state-wide convention for nominating to state offices, and, on the national level, by a national convention to select candidates for the presidency and vice presidency By 1835, and for upwards of 80 years thereafter, the representative convention was employed in choosing party candidates for almost all offices above those of townships and other minor local areas

Rise of the convention system

Its advantage

At its advent, the convention system was hailed as a decided improvement upon earlier nominating methods as indeed it was—if for no other reason, because it applied to the selection of party candidates the principle of representation upon which all government in America is supposed to be based Theoretically, the voice of each voter could be transmitted up the scale, from delegates on one level to those on the next, helping make selections as it ascended, until finally it registered itself for some candidate for the highest office in the land The convention also offered ready means for formulating and adopting party platforms (something which no substitute for it ever has done) and for arranging compromises among the various elements of the party

Disadvantages and decline

In operation, however, conventions—especially on state and lower levels—commonly disclosed defects For one thing, they often were too large for effective deliberation and their proceedings marred by disorder More serious, their members frequently were handpicked underlings of political bosses, bent on offices, spoils, and other personal or party advantages, rather than disinterested citizens concerned only with the public well being And under these conditions they usually ended by becoming mere 'market places of politics" where delegates and votes were in effect bought, sold, and traded as the fortunes of one candidate went up and those of another went down Altogether, the influence of the ordinary voter in selecting his party s candidates was likely to be little if any greater than under the legislative caucus, and it is not surprising that the system not only incurred vigorous criticism, but, after 1900, was almost everywhere discarded, both for congressional and state nominations and for nominations for county and municipal positions Where (aside from its use for presidential nominations) the convention plan survives at all today, it is likely to be only (as in New York, Michigan, Indiana, and one or two other states) for nominating to a few principal state-wide offices [5] In its place, a different nominating device—the direct primary—has been adopted, in one form or another, in all but one state (Connecticut), although it, too, is not without shortcomings

[5] In six Southern states however parties are permitted to employ conventions if they choose and in Iowa a convention is employed for nominating a party candidate for any office state or local for which no person has received as much as 35 per cent of the primary vote with South Dakota following the same plan in connection with the offices of governor United States senator and representative in Congress.

The direct primary—nature and workings

The essence of the direct primary is, of course, the selection of candidates by direct action of the voters themselves, and the procedures employed are so similar to those used in the final elections that the primary becomes, in effect, a preliminary intraparty election, and often in earlier days was called *a direct primary election* Primaries of the different parties commonly are held on the same day, and at the places where the regular elections are held some months later, they are administered by the regular election officials, with all costs met (except in some Southern states) out of the public treasury, the ballots are like those used in regular elections, and many of the same corrupt practice laws and other safeguards apply Persons seeking nomination to an office may get their names on a primary ballot simply by self-announcement and perhaps payment of a fee, or they may have been picked by some sort of party caucus or pre primary convention, [6] although the commonest method is to file a petition signed by some specified proportion of the voters in the area And ordinarily a candidate receiving the largest number of votes for a given office is declared the party nominee for that office, even though, with often three or four persons seeking the same nomination, the victor may win by virtue of only a plurality, rather than a majority With nomination in a one-party system practically equivalent to election, all Southern states, however, except Virginia and Tennessee require a majority, and if at the first balloting no candidate for a given position receives the requisite vote, a second, or "run off," primary is held, with the voters choosing between the two candidates standing highest at the first test In any event, winners in the respective party primaries automatically get their names on the ballots placed in the voters' hands at the later regular elections

"Non partisan" primaries

In the great majority of instances, the direct primary presupposes nominations on a party basis Where, however, nonpartisan elections have been introduced (as for legislative members in Minnesota and Nebraska, and for council or board members and for miscellaneous officers in many cities and some counties), they usually are preceded by a single nonpartisan primary conducted in all respects like a regular party primary except that the ballots carry no indication of the party affiliations of the persons to be voted for and that no question as to the voters' own affiliations is raised at the polls In this situation, the two candidates polling the highest and next highest number of votes for each office get their names on the nonpartisan ballot used at the ensuing election, the primary thus becoming "a sort of qualifying heat which eliminates the weaker contestants from the final race" and at the same time insuring ultimate election by majority rather than mere plurality [7]

"Open" and "closed" primaries

In most states, participation in a party primary is confined by law to persons registered as belonging to the given party, or able to meet some other test of allegiance to it And primaries so restricted are termed "closed," in contrast with "open" primaries, found in 14 states (including Illinois, Indiana

[6] More general choice of names to go on the primary ballot by responsible party organizations is the recommendation most stressed in the National Municipal League's recent important report cited on p 173 below

[7] Under arrangements sometimes prevailing, however the candidate receiving the highest vote is forthwith declared elected

and Wisconsin) where no attempt is made to prevent Democrats from taking a hand in Republican nominations, and *vice versa*. Even where the closed system nominally prevails, the tests of membership employed sometimes notoriously fail to prevent voters from "raiding" or "colonizing," *i.e.*, taking part in making the nominations of a party different from their own, usually with a view to promoting nomination of candidates who can easily be beaten later.

Merits and defects of the direct primary

The direct primary method of choosing party candidates unquestionably gives the rank and file of a party considerably more control over nominations than it ever enjoys when candidates are picked merely by delegate conventions. Beyond this point, however, supporters and opponents of the device hold widely varying views as to its superiority over the convention system. The former argue (1) that, even though the popular turn out at primaries is commonly disappointing and sometimes pathetically scant, the voters at least respond somewhat more freely than when asked to come out only to choose convention delegates under the old system, (2) that the primary has materially weakened machine control of nominations, (3) that it affords opportunity to bring forward superior candidates—at all events a better chance to defeat conspicuously unfit ones, and (4) that corruption, which often was a decisive factor in determining the selection of candidates by convention, is robbed of most of its potency. Opponents of the device, on the other hand, are in the habit of denying outright most of these assertions, and of arguing that the primary (1) entails an added drain on the public treasury, (2) imposes greater financial burdens (particularly in urban areas) upon candidates winning one popular campaign only to be confronted with starting another, (3) favors candidates with "special interest" backing and plenty of money to spend (also self-advertisers and demagogues), (4) weakens political parties and party organization, (5) destroys or impairs party responsibility, (6) fails to prevent bosses and machines from continuing to manipulate behind the scenes, (7) multiplies the number of candidates and promotes minority nominations, (8) affords no suitable means of framing platforms, and, crowning all else, (9) does not produce better officials. Obviously, most of the arguments employed, both ways, are largely matters of opinion, and cannot simply be brushed aside by categorical counter assertion. Under widely differing laws prevailing in different states, results have varied from state to state, and even from time to time and place to place within the same state, and on this account the only trustworthy method of appraising the system is to compare results under it, state by state, with conditions prevailing in the same states under the convention regime. With this test applied, conclusions are likely in most cases to be favorable although this by no means excludes the possibility of important improvements.

## ELECTION MACHINERY AND PROCESSES

*Registration of voters*

In Texas, voters presenting themselves at the polls establish their right to cast a ballot by showing their poll tax receipts, but everywhere else the names of lawful voters appear on formal registers, or lists, locally compiled, as a rule by county or city clerks Until fairly recently, registration in a majority of the states was periodic, in the sense that the voter could keep his name on a list only by re registering at yearly or other fixed intervals (most often biennially or quadrennially), and many people still think this the surest method of keeping the lists free from the names of persons who have died, moved away or for any reason become disqualified The system, however, is expensive, a good deal of inconvenience is caused the voters, many fail to re-register, and 42 of the states now have introduced some plan of "permanent" registration (state-wide in 32 and for certain areas—usually the larger cities—in the others), under which a voter, once registered, remains on the list as long as it is not discovered that he should be removed With all of the names arranged conveniently on cards or loose-leaf sheets, registration officials keep continually revising the lists as new voters report for registration and old ones drop out Whatever system may be in use, the task of guarding against fraud is difficult, and the officials in charge need to be persons not only of intelligence but of high integrity Honest registration is the first line of defense against corrupt elections

*Further preparations for elections*

Still other preliminary work is necessary before an election can be held An apportionment of the voters, on geographical lines, must be worked out, so that each will be able to vote in his proper district or precinct—which in rural regions may be a fairly large area, but in towns and cities is likely to be a ward or some subdivision thereof containing a maximum voting population of from 200 in California to from 500 to 800 in Illinois [8] Polling places must be designated, with preference in these days for school buildings, police and fire stations, and other locations of a little more dignity and attractiveness than the livery stables, barber shops, and other places commonly employed before the feminine touch was added to our politics Polling officers must be appointed, commonly on a bipartisan basis and from residents of the precinct, polling hours and places must be duly advertised, sample and official ballots must be printed and distributed, other polling equipment, from voting machines (where used) down to lead pencils, must be made ready In large cities, these functions are performed as a rule by special election boards, appointed by the governor or otherwise, elsewhere, they commonly fall to county authorities such as boards of supervisors or commissioners Few people realize the magnitude of the preparations entailed in a major city or even a populous county

*Polling officials*

On election day, the polls in each district or precinct are in charge of polling officials previously appointed Varying in number, titles, terms, method of

[8] It is not to be understood that these arrangements are made afresh for every election although changes may be fairly frequent

selection, and rate of compensation—from state to state, and even in different parts of the same state—such officials usually include an inspector, who has general charge, two judges, who help decide disputes, two or more clerks, who have custody of the voters lists, initial, number, and pass out the bal lots, and check off the voters to whom ballots have been issued, and as a rule one or two police officers, although the duty of quelling possible disturb ances and maintaining general decorum may be left to regular sheriffs' deputies or police [9] At first glance, the duties of polling officers may seem so simple and so purely clerical that almost any person could perform them Certainly this is the theory on which the officials nowadays are too often selected, in many places, the posts are simply distributed by local politicians among their friends as political favors Full knowledge of the election laws—no simple matter—ought, however, to be possessed, as well as the intelligence and judgment necessary to deal properly with doubts and controversies which almost inevitably arise Circulars of instructions usually are distributed in advance to persons who are to serve, but that is about as far as present precautions commonly go

Casting the ballots—voting machines

When, on election day, the voter enters the polling place he takes his turn in identifying himself to the clerks carries an official ballot to a screened compartment, or 'booth,' marks it according to his preferences, folds it with its number and a clerk's initials on the outside, and, emerging, deposits it in the ballot-box, and is duly checked off as having voted, or, if machines are employed, he identifies himself at the polls in the usual way, but instead of receiving a printed ballot, is directed to a curtained compartment in which stands a mechanical appliance showing on its face the lists of candidates which the printed ballot would contain if one were used and where he votes by merely pulling levers—usually a single master lever if voting a straight ticket, otherwise individual levers for particular candidates Automatically recording the votes and simultaneously adding them up, the voting machine has the important advantages of better protected secrecy, economy of time, elimination of defective votes, almost complete security against fraud, and full tabulation of results the moment the polls are closed [10]

Absentee voting

Not all voters are so situated, at a given election, as to be able to present themselves at the polls The number who cannot do so is, of course, particularly large in wartime, and as far back as the Civil War, provision was made

people away from home on business trips, and many other persons un- avoidably" or 'necessarily' absent (as the laws put it) from their voting

[9] Not of course, as election officers but with a view to looking after party interests,

precincts at election time Considering it unjust that people so situated should be compelled to lose their votes, Vermont led off in 1896 with a statute making general provision for absentee voting, and today all states except Pennsylvania, South Carolina, and Mississippi have laws on the subject, although in some instances applying only to certain elections rather than to all, and in two or three cases only to persons in the armed services Procedures vary in detail but in general the voter applies to the proper home official for the privilege of voting *in absentia*, receives a ballot directly or through an official in charge of elections where the voter is, and—after validating himself before a notary or other official—marks his ballot and mails it to the proper home authority

Tabulating and reporting electoral results

Reverting to the regular electoral process, one next notes that when the polls close, the results are canvassed and tabulated, usually by the polling officials indicated above, although about a dozen states, including Iowa, Kansas and Nebraska, have a "double election board," with a "receiving board" in charge of the polling and a "counting board" reckoning up results and usually starting while the voting is still going on If voting machines are used, there is little to be done except to open them and find what they have recorded In the majority of instances, however, there are printed ballots to be counted—perhaps 500 or more—and the already weary clerks attack the job—sometimes in the presence of any voters who care to look on, but usually with only the polling officials present [11] The task completed (with laborious recounts in case of ties or very close votes), all ballots, used and unused, including spoiled and defective ones, together with the poll-books and tally-sheets, are placed in sealed packages or ballot boxes, and all are preserved and carefully guarded for a specified period, after which the ballots are destroyed

Meanwhile, the chief election officer sees that "return blanks" are filled out in duplicate or triplicate, showing the exact number of votes received by each candidate, and, his signature having been affixed, one set is sent off to the city or county clerk or to a board of elections, while another goes to some higher canvassing authority, *i e* the county board of supervisors in California and other states, the judges of the court of common pleas in Pennsylvania, the county clerk assisted by two justices of the peace in Illinois, and the board of election commissioners in most large cities By telephone, or otherwise, the results are reported to the press and party leaders the moment they are ascertained, and, consolidated with others pouring in from over the electoral area, they enable an interested, and perhaps excited, public, hovering before radio sets and loudspeakers, to know how things are coming out

Final stages of the count

On a day fixed by law, the canvassing bodies in each county or city proceed officially to add up all the votes cast and, in so far as state and national offices are involved, certify the results to some state official (usually the secretary

[11] In some cities and other areas however, there is "central counting", that is ballot boxes are collected from all of the precincts and opened and the count made at the city clerk's office or some other designated place

of state), who is required to consolidate and transmit the returns to a state canvassing board The last stage is reached when the state and county canvassing boards file their reports with the officials designated by law, usually the county clerk in the case of county offices and the secretary of state in that of state (and national) offices, whereupon these officials issue to each person declared elected a certificate of election which is *prima facie* evidence of his or her legal right to hold the office and perform the duties connected with it

Disputed elections

Such a certificate is not, however, conclusive, for all state election laws include detailed provisions for "contested elections," that is, for disputes arising when a defeated candidate alleges that he has been illegally denied a certificate of election Such cases are commonly settled in the courts, although in some states, *e g*, Illinois the legislature decides conflicting claims to the highest state offices Where contests involve a seat in the state legislature or in a city council, the legislative house or the council concerned almost invariably has the power of decision By constitutional provision, too, disputed seats in Congress are awarded by the appropriate branch

## BALLOT FORMS

The Australian ballot in general use

In contrast with days when voting was oral (or by show of hands) and public, secrecy now is everywhere provided for, either in the state constitution or by statute, and it has been effectively attained through the adoption since 1888 of the so-called Australian ballot in every state, most recently South Carolina [12] The essence of the Australian system is that the only ballots allowed to be used are prepared by responsible public officials at public expense and in accordance with forms prescribed by law, are given to voters only at the polls, are marked only in the privacy of the polling booth, and hence can be cast without possibility of detection of the ticket for which one has voted The ballot is normally in blanket form, *i e* bearing on a single sheet the complete list of offices to be filled and of candidates, although when national, state, and city elections are held simultaneously, the names of candidates for presidential elector, and also of candidates for municipal offices, sometimes are printed on separate sheets [13]

Principal ballot *forms*

The arrangement of the names of candidates on the ballot varies in different states, but usually conforms to one or the other of two major plans In the party-column type of ballot, introduced in Indiana in 1889, and now used in 27 states, names of the candidates of the different parties are printed in separate vertical columns, at the head of which appears, in each case, the party name and a "party circle" or "party square," and (for the benefit of illiterate voters) in 15 states a party emblem, or vignette The voter has merely to place a single cross in this circle or square (or, if voting machines are used, pull a single lever) to vote for all of the candidates of a given party This obviously facilitates what is called "straight ticket" voting, and accord-




## Democratic Ticket

DEM. For United States Senator ALEX M. CAMPBELL

DEM. For Secretary of State CHARLES F FLEMING

DEM. For Auditor of State JAMES M PROPST

DEM. For Treasurer of State F SHIRLEY WILCOX




## Republican Ticket

REP For United States Senator HOMER E. CAPEHART

REP For Secretary of State LELAND L. SMITH

REP For Auditor of State FRANK T MILLIS

REP For Treasurer of State WILLIAM L. FORTUNE




## Prohibition Ticket

PROH For United States Senator LESTER N ABEL

PROH For Secretary of State J RALSTON MILLER

PROH For Auditor of State GARNETT JEWELL

PROH For Treasurer of State HORACE N SMITH

PARTY COLUMN BALLOT FORM

To vote for a Person, mark a Cross X in the Square at the ... X

To vote for a Person, mark a Cross X in the Square at the ... X

| LIEUTENANT GOVERNOR | Vote for ONE |
|---|---|
| CHARLES F JEFF SULLIVAN of Worcester | Democratic |
| LAURENCE CURTIS of Boston | Republican |
| LAWRENCE GILFEDDER of Boston | Socialist Labor |

| SECRETARY | Vote for ONE |
|---|---|
| EDWARD J. CRONIN of Chelsea | Democratic |
| RUSSELL A. WOOD of Cambridge | Republican |
| ELLSWORTH J. M. DICKSON of Needham | Prohibition |
| FRED M. INGERSOLL of Lynn | Socialist Labor |

| Third District | Vote for ONE |
|---|---|
| OTIS M. WHITNEY of Concord | Republican |
| JOHN A. DOLAN of Boston | Democratic |

| SENATOR Fifth Middlesex District | Vote for ONE |
|---|---|
| RICHARD L. FURBUSH of Waltham | Republican |
| JAMES L. VAHEY of Watertown | Democratic |

OFFICE BLOCK BALLOT FORM

ingly the plan is regarded with high favor by politicians, at least of dominant parties Wyoming and a few other states, although retaining the party column for the guidance of voters, omit the party square or circle at the head of the column, leaving it impossible to vote a straight ticket merely by making a single cross, and in Texas one votes a straight ticket by drawing lines through the candidate lists of the parties he does not wish to support

In 17 states, including Massachusetts, New York, Ohio, and California, a different arrangement is employed—an 'office block" scheme which puts less stress on party regularity and more on the weighing of individual candidates The names of candidates of all parties are grouped according to offices sought, with the party to which each candidate belongs designated alongside his name, except in four Southern states Typically there is no way of voting a straight ticket with a single cross or a single pull of a lever, on the contrary, the voter must place a cross (or pull a lever) opposite the name of every candidate of the party of his choice—with a possibility, as he moves down the list, of being tempted to vote for a candidate or two of a different party For this reason, the Massachusetts type of ballot, as this form is called (because it was first employed in that state, in 1888), is regarded as favoring independent, or 'split ticket," voting and is not popular with political bosses

## RECALL ELECTIONS

Purpose

Normally, elections are held only when officers' terms are about to expire, or occasionally to fill a vacancy arising from the death or resignation of an incumbent One sometimes hears, however, of an election in reverse, aimed at 'recalling" an official in the midst of his term Elective officers on higher levels, including state judges, usually are subject to impeachment In particular situations, however, there may be reasons for wishing to get rid of such officers although hardly justifying resort to a procedure so drastic, and back in the early part of the present century, with a tide of "direct" popular government running strong, many persons became enamored of the idea that the voters ought to be able to institute recall proceedings against an official, ousting him unless he could weather an immediate test of reelection The idea, indeed, took hold to such extent that a dozen states [14] adopted some form of recall procedure for use against state officers (usually elective ones only), and especially against officers of counties and of municipalities under commission or council manager government

Procedure

Except for the manner in which it is initiated, a recall election does not differ greatly from any other When a movement to oust a given official gets under way, a "petition" setting forth the charges against him is circulated in a quest for signatures, and if the requisite number (usually about 25 per cent of the electorate of the area concerned) is obtained, the city clerk or other official with whom it is filed sets a date for a recall election If the official

[14] Oregon (1908) California (1911) Washington, Colorado Idaho Nevada and Arizona (1912) Michigan (1913) Louisiana and Kansas (1914) North Dakota (1920) and Wisconsin (1926)

whose recall is sought chooses not to face the issue, he may simply resign If, however, he prefers to fight for vindication, his name is placed on the ballot along with the names of any persons nominated to succeed him, and the voters render the verdict If the incumbent polls the largest number of votes, he continues in office If, however, one of his opponents outstrips him the victor immediately assumes the office and fills out the remainder of the term, the incumbent being, of course, 'recalled "[15]

Results

In practice the recall has proved no very significant addition to our electoral usages There is, it is true, no way of measuring the moral effect upon office-holders of their awareness that a gun is behind the door But one hardly can believe that the comparatively few instances in which the device has been successfully invoked by dissatisfied voters represent all of the situations in recall election states in which officials deserved to be ousted A goodly number of local officers, including a mayor of Los Angeles, have been recalled in California—a mayor also in Seattle and Detroit But in only two instances (in North Dakota and Oregon) have officials chosen by the voters of an entire state been reached, and it is significant that there have been no new state adoptions of the plan in a quarter of a century

## THE ELECTORAL SYSTEM CRITICIZED—SOME PROPOSED CHANGES

Despite significant improvements in the past 30 or 40 years, the electoral system outlined still incurs, and rightly, a good deal of criticism—not only sometimes on the ground of excessive, wasteful, and occasionally corrupt use of money, but with respect also to the frequency of primaries and elections, the holding (too often) of local, state, and national elections at the same time, the unnecessarily large number of offices filled by popular election, and the very general practice of electing by mere plurality

1 Frequency of elections

Concerning the frequency of elections, nothing more need be said than to cite the familiar fact that the election of president and vice-president and of various officers of a number of states occurs every four years, that some state officers are elected triennially, and far more, along with congressmen and most county officers, biennially, that a good many county and local offices *are filled annually*, and that a very great majority of these elections are preceded by primaries Not only do these fast recurring primaries and elections impose a heavy financial burden upon taxpayers, but they make it difficult for the average preoccupied citizen to sustain an intelligent interest and take a personal part in the nomination and election of the men who in various ways act for him in the conduct of public affairs

National, state, and local elections often fall on the same day, with the result that the names of candidates for offices on all three levels, or at least for national and state offices, are not infrequently printed on the same ballot This tends seriously to confuse national with state and local issues, commonly

[15] Under some systems however the first vote is on the question of recall only with a separate election following if a vacancy results

**2 Simultaneous national state and local elections**

to the detriment of state and local government A remedy has been sought in many states by arranging elections so that the most important state and local contests will be held in years in which presidential and congressional elections do not occur Some states, indeed have not stopped here, but have also separated purely local from state elections Separation in this manner may, however, be carried so far as unduly to increase the number of elections occurring in a single year, as has happened in Illinois, where in some years voters have been called to the polls as many as seven times

**3 The long ballot**

Of far greater seriousness than either of the foregoing defects is the long and confusing ballot with which voters frequently are confronted when they go to the polls, and accounted for (1) partly by national, state, and local elections falling at the same time, (2) partly by the circumstance that in primaries there often are half a dozen or more and in final elections frequently three or four, candidates for every place to be filled, (3) partly by constitutional amendments and proposed legislation put before the voters where the initiative and referendum are employed (4) partly by the frequent submission of proposals for bond issues, but (5) chiefly by the excessive number of offices, lower as well as higher still kept on an elective basis In any event, ballots (or sheafs of ballots) bearing 50 75 or even beyond 100 names are by no means uncommon And the results are unfortunate Few if any voters can have any familiarity with the qualifications of most of the persons listed, even the best informed will take an interest in, and frame intelligent judgments on, only those seeking the most conspicuous posts, a great deal of voting will be entirely blind, based simply on party allegiance, hearsay, or mere whim, numerous voters, indeed (if they go to the polls at all), will merely start bravely at the top, vote for a few of the more important offices (president, governor, and perhaps congressmen) and then succumbing to what has been aptly termed "voters' fatigue," taper off by voting for few or none at all toward the bottom—with constitutional amendments and similar proposals (usually placed last) faring so badly that it often is almost impossible to secure their adoption Meanwhile, taking advantage of the well known popular preoccupation with the most conspicuous officers, politicians often, by delivering small but solid blocks of votes are able to get wholly unfit candidates into minor, though not unimportant, posts

**Remedies**

One way of simplifying the voter's task is to avoid holding national, state, and local elections at the same time But an even better way is to reduce sharply the number of positions he is asked to help fill Officers who have a share in translating public opinion into law, or who enjoy large discretionary powers in the administration of laws—in other words all policy determining officials—should continue to be elective But there are surprisingly few of these The president, the members of both branches of Congress the governor and members of the legislature, and the mayor and members of the city council are obviously policy-determining officers In somewhat less degree, the same is true of boards of county commissioners or county supervisors But there the list practically ends, with popular election, if carried farther, yielding no advantage not more than offset by evils traceable to increasing

the ballot's burden A few states, *e g*, New York and Virginia, have made officers like secretary of state and state treasurer appointive; and cities under commission or council manager government commonly have "short ballots" In most states, in a great many cities, and in practically all counties, however, such reforms remain to be undertaken

4 Plurality elections

The last of the several criticisms enumerated is directed against election by mere plurality Whenever three or more candidates seek the same office, the successful one, although polling the largest vote, is often found with fewer than half of the total, and to some people this seems an unfortunate violation of the principle of majority rule supposedly inherent in democracy Literal majority rule, however, is not always easily attainable In any event, plurality —often meaning minority—elections continue in nation, states, counties, and most cities as part of the accepted order of things In 50 or more cities, nevertheless—*e g*, Denver, Portland (Ore ), Spokane, and Columbus (O )—a partial remedy has been found in a system of "preferential' voting under which, in a nonpartisan election, (1) the names of all candidates (placed on the ballot by petition) are grouped by offices, as in the Massachusetts form, (2) for each office the voter may indicate his first, second, and other choices, (3) if any candidate is found to have received a majority of the first-choice votes, he is forthwith declared elected, (4) if no one has such a majority, second-choice votes are added to first choices, with the office going to any candidate having a majority on that basis, and (5) if there still is no majority, third choices are added also, with the highest aggregate number then determining the result, whether representing a majority or not Without positively insuring majority election, the plan nevertheless strongly promotes it, and on that account, as well as because of obviating any need for primaries, it has won a certain amount of favor [16]

The preferential ballot

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## CHAPTER 12

# Nominating and Electing a President

Every two years, the people of the United States elect 435 members of the national House of Representatives, one-third or more of the 96 senators, and multiplied thousands of state and local executives, administrators, lawmakers and judges Every four years they choose, in addition, a president and a vice president—or at all events the 531 "electors" who later, meeting in the various state capitals go through the formality of registering and confirming the popular verdict In nominating and electing these topmost officials, parties are stirred to liveliest action and voters drawn in largest numbers to the polls

*The pageant of a presidential election*

The pageant of a presidential election in this country is, indeed, the most remarkable thing of its kind anywhere Hardly is a new chief executive settled in the White House, with four long years of toil and anxiety ahead of him, before plans are afoot for the next supreme test of electoral strength, and as the red letter date approaches, potential candidates emerge, "booms" are launched, personal and party groups spar for advantage in the press, on the floor of Congress, and in the swirls and eddies of congressional, state, and local politics Four or five months before the choice is to be made, tumultuous national conventions battle over nominations and platforms A pause intervenes for shaping strategy and throwing the nation wide party machinery into high gear, then the fight is on With steady crescendo, the drama advances from scene to scene, until at length, on election day, 50 to 55 million people go to the polls and settle the fate of the candidates Thousands of speeches have been made, floods of ink spilled, millions of dollars spent

*The original electoral plan*

Needless to say, this is not at all the sort of thing that the makers of our national constitution had in view They did not want the president elected by Congress, because then he would not be sufficiently independent Neither did they want him chosen by the people, because that would invite 'tumult and disorder', besides, the voters, scattered thinly over what already seemed a large country, would not know enough about the qualifications of available men to be able to make wise decisions In the end, a scheme of indirect election was adopted with (1) each state choosing presidential electors equal in number to its senators and representatives, (2) each elector casting a ballot for two persons, and (3) the persons receiving the highest and second highest

electoral votes throughout the country becoming, respectively, president and vice president [1]

For a time, the plan worked as intended Soon, however, political parties started putting "candidates' in the field, electors chosen by a given party began voting as a matter of course for that party's candidates, and the electoral college became—as it ever since has remained—a mere recording machine One of a party's two candidates actually would be intended for the presidency and the other for the vice presidency But in form both would be competitors for the presidency and with all Federalist and Republican electors voting for both candidates on their respective tickets, the result hardly could fail to be a tie in each case A majority deadlock of the kind indeed, arose almost immediately, when in 1800 the Republican candidates, Jefferson and Burr, received precisely the same number of votes The constitution, to be sure, provided a way out a tie was to be broken by the House of Representatives, voting by states, and in this manner Jefferson finally was elected The Federalists, however, came near to thwarting the intention of the victors by maneuvering Burr into the higher office, and on the eve of the next election any repetition of the difficulty was made impossible by an amendment to the constitution specifying that thenceforth electors should in all cases "name in their ballots the person voted for as president and in distinct ballots the person voted for as vice-president '

The Twelfth Amendment (1804)

## DEVICES FOR NOMINATING CANDIDATES—THE NATIONAL CONVENTION

The next significant development had to do with a matter for which the framers of the constitution made no provision *i e* the nomination of candidates As originally set up, the electoral system did not contemplate "candidates at all When, however, political parties arose, their main object naturally came to be to capture control of the presidency To do this, they must concentrate their support at election time upon a given individual, which, in turn, they could do only if such individual or candidate were agreed upon in advance, and hence arose the need for machinery for making the selection

Nominations become a necessity

The first device hit upon was the one easiest to contrive, *i e*, a caucus composed of the (national) senators and representatives of a given party, and it was employed straight along from 1800 to 1824 There were, however, serious objections to it The caucus acted only by assumed authority, it provided little or no voice for party members in states in which the party was in a minority, and it gave members of the legislative branch an influence in selecting the chief executive which they clearly were not intended to have In a period of steadily broadening democracy, revolt against it became inevitable, and in 1831 both the National Republican and Anti Masonic parties turned for a substitute to popularly chosen nominating conventions, already

From congressional caucus to national convention

[1] Art. II § 1 cls 2 3

employed usefully in many state elections Candidates were nominated and platforms adopted and in 1832 the Democrats fell into line with a convention of their own Many political leaders, including Webster and Calhoun, opposed the new method on the ground that it gave too much power in party matters to the rank and file Nevertheless, by 1840 the national convention became the generally accepted means of putting both candidates and platforms before the voters, and such it has remained

Arrangements for conventions

Nowadays the national conventions of the two major parties, and likewise of such minor parties as have built up durable organizations, are held on call of the respective national party committees A year or more preceding a presidential election, the committee of a given party meets (commonly in Washington in the case of the Republicans and Democrats), decides upon the place and date of the coming convention, and authorizes the party organizations in the states and territories to see that delegates and alternates are chosen in accordance with an apportionment set forth in the call The Republicans usually hold their convention about the middle of June, the Democrats two or three weeks later, and the place is selected (from a list of cities competing for both the advertising and the business that such a meeting brings) with an eye not only to hotel and convention hall facilities and donations toward expenses but also to the preferences of influential candidates and other leading politicians, the need for stirring enthusiasm in a given state or section, and other considerations of party interest or strategy [2]

Convention membership

1 Earlier arrangements

Except in so far as state laws regulate the method of electing delegates, every party determines for itself how its conventions shall be made up, as well as how they shall operate national law has nothing to do with the matter The earliest plan was simply to allow each state as many delegates as it had senators and representatives in Congress In 1852, however, the Democrats and in 1860 the Republicans, doubled this quota, and for a long time the regular practice of both parties was to give each state (a) two district delegates for every congressman representing a district, (b) the same number for every congressman at large, if any, and (c) two delegates for each of the two senators

2 Incongruities

It would seem an elementary principle that seats in any gathering intended to be representative should be apportioned according to the numbers and distribution of the people to be represented Manifestly, however, the arrangements described were not at all on that basis A Northern state containing relatively few Democrats was entitled to quite as many delegates in a Democratic convention as a Southern state, of equal population, containing 10 to 12 times as many Similarly, Southern states yielding few Republican popular votes (and, with rare exceptions, no electoral votes at all) sent to Republican conventions as many delegates as Northern states, of equal population which unfailingly rolled up substantial Republican majorities, slender Southern Republican minorities had great weight in selecting candidates and making platforms, but contributed little or nothing to party victory

[2] Chicago centrally located and with excellent hotel and auditorium accommodations draws more of the conventions than any other city including those of 1952

The disproportion was more glaring on the Republican side than on the Democratic because of the gross over representation of an entire section of the country, and while both parties now have taken corrective measures, the Republicans naturally were the first to act The matter was brought to a head for them by a crisis developing in 1912 The skeleton Republican organization maintained in states of the Lower South consisted principally of federal office holders, and this put a president who had appointed them in a position to handpick Southern delegates, pack a convention with them, and perchance dictate his own renomination or control the choice of a successor Theodore Roosevelt brought about the nomination of Taft in this way in 1908 When, however, four years later, Taft employed similar tactics to keep Roosevelt delegates out of the Chicago convention in which he hoped to be (and eventually was) renominated, the party split asunder, Roosevelt taking his following into a new Progressive party and the Republicans in the end going down to defeat It was chiefly the Southern delegations that had caused the trouble, and after a time the Republicans began paring down Southern representation Even yet such representation is somewhat too heavy But by cutting states, the country over with few Republicans and granting bonuses to others achieving a good record in the party's service, the following pattern, under rules adopted in 1948 for the 1952 convention, has been arrived at

3 Remedies adopted

REPUBLICAN NATIONAL CONVENTION (1952)

4 Allotments in 1952

*Delegates at large*

1 Four from each state
2 Two additional from each state for each congressman at large (if any)
3 Six additional from each state going Republican in the last presidential, senatorial, or gubernatorial election
4 Six each from Hawaii and the District of Columbia, three each from Alaska and Puerto Rico and one from the Virgin Islands [3]

*District delegates*

1 One from each congressional district casting 1,000 or more votes for any Republican presidential elector in the last preceding presidential election or for a Republican nominee for Congress in the last preceding congressional election
2 One additional from each district casting 10,000 or more Republican votes in either such election

*Alternate delegates*

1 One for each delegate

The Democrats went along on the old basis without much trouble until 1940 Contrary to the Republican situation, Southern states were underrepresented Yet, with a two-thirds vote required to nominate in a Democratic convention, they held virtually a veto and were reasonably satisfied When, however, the convention of 1936 substituted nomination by simple majority,

[3] Representation for territories allowed by both parties is simply a courtesy The areas concerned have no part in the final election

demand at once arose for increased representation as an offset, and under instructions from the 1940 convention, arrangements were instituted which for the 1948 and 1952 conventions were as follows [4]

DEMOCRATIC NATIONAL CONVENTION (1952)

*Delegates at large*

1 Four from each state
2 Four additional from each state for each congressman at large (if any)
3 Four additional from each state carried in the previous presidential election
4 Six each from Alaska Hawaii Puerto Rico and the District of Columbia, and two each from the Virgin Islands and the Canal Zone

*District delegates*

1 Two from each congressional district

*Alternate delegates*

1 One for each delegate

In earlier times, delegates to national conventions were chosen in several different ways—by mass meetings, by caucuses, by district and state conventions, even by state party committees Gradually, however, two fairly standard systems developed—one Democratic, the other Republican Viewing [illegible] e delega- [illegible] selected [illegible] even the state central committee Putting less emphasis on state solidarity, the Republicans, on the other hand, were likely to elect delegates at large in state conventions, but all others in conventions in the several congressional districts, rules adopted in 1884 and 1888 indeed made this plan obligatory

Shortly after 1900, however the direct primary began to be used in nominating candidates for state and local offices, and inevitably the question arose of applying the new device to the choice of delegates to national conventions This was first done in Wisconsin in 1905, and so rapidly did the idea take hold that in 1916 more than half of the entire number of delegates of both of the leading parties were chosen, in more than a score of states, under the primary plan Some states, beginning with Oregon in 1910, provided not only for popular election of delegates but for an expression of the voters' preferences among persons seeking nomination, some even sought to bind the delegates to be guided by preferences so expressed From time to time, too the suggestion was broached, *e g*, by President Wilson, that the presidential primary, in some one of the numerous forms that it had assumed, be made nation wide by federal law After having started off, however, with apparently irresistible force, the movement lost momentum Since 1916, no additional

[illegible]

states have been added to the list, while 10 have dropped out Nor does the device have a promising future Those who believe in it (and many people do so) properly argue that it has never been given a fair nation-wide test But the only way in which it could be given such a test would be by virtue of an act of Congress, and notwithstanding that the Supreme Court has cleared the way constitutionally for such legislation, the Congress is not as yet sufficiently convinced of the intrinsic merits of the plan Meanwhile, with the presidential primary surviving in mandatory form—for all or some delegates—in only 16 states, the delegates of 28 states continue to be chosen in state conventions and those of the remaining four by state central committees or in alternative ways [5]

## THE NATIONAL CONVENTION AT WORK

Surrounding conditions

Composed mainly of state and local party leaders and workers, business men, lawyers, and journalists with a liberal admixture of governors of states, senators and ex senators, congressmen and ex congressmen, and state legislators,[6] the convention of a major party meets in a large hall, lavishly decorated with flags, bunting, and portraits and capable of seating usually from 15 000 to 20,000 people The thousand or more delegates are accommodated on the main floor, grouped around placards bearing the names of their states, the equally numerous alternates are seated directly back of them, representatives of the press, together with radio reporters and commentators, are given generous space, the galleries are packed with intermittently interested and restless spectators, radio ' hook ups are in readiness to carry the proceedings to every corner of the land, television equipment also is increasingly in evidence Except during principal speeches and at occasional tense moments, there is a general buzz of conversation, bands fill in intervals with popular airs, deafening 'demonstrations' break forth from frenzied supporters of 'favorite sons" or other candidates, sheer chaos sometimes prevails for an hour at a stretch Small wonder that, many years ago, the late Lord Bryce was moved to remark that the setting seems hardly compatible with the deliberative work to be performed, and indeed it is only because practically all of the problems are thrashed out and decisions made behind the scenes—in committee rooms, in the smoke filled suites of influential delegates, indeed wherever private conferences can be held and understandings reached—that the body performs its functions effectively at all

Temporary *organization*

Although, under wartime conditions, the conventions of 1944 were streamlined to cover only three days, such gatherings usually last four or five days—sometimes longer On the first day, the meeting is called to order by the

[5] In some instances different methods are employed in the same state e.g New York deleg[illegible] on ent on the remainder in primaries

[illegible] ostmasters revenue-collectors, below) prohibiting pol tical to do with framing policy) Art II § 1 cl 2) forbids to the spir t of the provis on has come to be far more

chairman of the national committee, who, after prayer has been offered and the call for the convention read, announces the list of temporary officers agreed on in advance by the committee, whereupon—the list having been accepted by the convention, usually as a matter of routine—the temporary chairman delivers a 'key note' speech (prepared before the convention met) eulogizing the party drawing applause by referring to the great names associated with its past, assailing the record and belittling the promises of its opponents, urging harmony and in general sounding a call to battle Pending permanent organization, the rules of the convention held four years previously are adopted, and the day's work may close (or the next one's begin) with a roll-call of the states and territories, each delegation nominating, through its chairman, one of its members (in the case of platform and resolutions, two) to serve on each of the four great committees (1) credentials, (2) permanent organization, (3) rules and order of business, (4) platform and resolutions—although the less wearisome plan is generally followed of permitting the chairman of the several delegations merely to hand in written lists of proposed committee assignments [7]

Permanent organization

Reports from the first and third committees mentioned are likely to consume considerable time, especially if contesting delegations choose to carry their controversies to the floor, but by the second or third day the convention is ready to organize permanently The committee on that matter reports, nominating a list of permanent officials, and ordinarily the persons named are elected without debate, although it was only after a sharp contest that Senator Walsh was chosen permanent chairman of the Democratic convention in 1932 The permanent chairman will have many difficult decisions to make, and he must be both a master of parliamentary law and a man of energy and decision

Framing and adopting the platform

Following a lengthy and usually more restrained speech by the new presiding officer, the convention is ready for a report from the committee on platform and resolutions Actually designated in advance by the national committee (although formally confirmed by the convention), and working day and night for perhaps a week over a vast array of platform proposals—bombarded also with suggestions and demands from both delegates and outsiders—a drafting sub committee usually will have succeeded in whipping together a document which can be reported unanimously, and while there usually is some show of discussion on the floor, and occasionally lively conflict, only rarely is anything finally voted that the committee has not itself proposed [8] As approved by the convention, the platform is likely to be a document filling 10 or 12 pages of print and touching upon a wide variety of topics On some matters it will make clear and definite pronouncements, on others—usually *most* others—it will be wordy and evasive, on still others, although perhaps of vital public

[7] Equal representation of women with men (one from each state and territory) on the platform and resolutions committee was introduced by the Democrats in 1940 and by the

[illegible] on the next morning

concern, it will be completely silent, for the reason that anything that could be said would tend to alienate votes But there will be plenty of generalities glibly extolling the party's achievements, unsparingly indicting the opposition, and voicing platitudes of hoary antiquity By and large, the platform is viewed by the sophisticated, not as a program to be carried out if the party wins, but rather as a bid for the confidence and support of the more susceptible elements in the electorate Fully understanding this, people rarely are so naïve as to take a platform seriously, many do not even read it Sometimes, indeed—as in 1928 and 1932—platforms are so overshadowed by the personalities and announced policies of the candidates that, once the campaign is under way, they almost fade out of the picture

Nomination of candidates

At last, by the third or fourth day, the convention arrives at its main objective, i e , the nomination of candidates The secretary calls the roll of states, beginning with Alabama, and each delegation, in its turn has an opportunity to place a 'favorite son' or other person in nomination If the delegates of a state which stands near the top of the list choose to do so they may yield to a delegation which under alphabetical order would not be called until later, and this opportunity to get a candidate's name officially before the convention in advance of others, and to touch off a demonstration in his behalf, may prove a decided advantage Anywhere from two or three to upwards of a dozen names may be presented, each in a vigorous eulogistic, and sometimes flamboyant nominating speech followed by briefer seconding speeches by delegates carefully selected to give an impression of widely distributed support, and no effort is spared by either the orators or the delegates and spectators favoring a given candidate to whip up enthusiasm for him

Voting on the candidates

The Democratic "unit rule

When, finally, all of the names have been presented, the convention proceeds to ballot [9] The roll of states is called again, and each delegation, through its chairman, announces its vote Traditionally Republican delegations are free to split their votes among rival candidates, except only as restricted by instructions received in presidential primaries, and on the first ballot in 1948, 37 state and territorial delegations reported votes distributed among Dewey, Stassen Taft, and minor candidates Democratic tradition, however, has been different Reflecting the states' rights antecedents of the party, and yielding the practical advantage of greater power and importance for a state in convention proceedings, a "unit rule" has been favored under which a state convention may require a delegation to cast its votes in a block for a single candidate, or, even if no such requirement is imposed, a delegation may itself, by majority vote, determine how the votes of all of its members shall be recorded This so-called 'rule" is not imposed by the national convention, state conventions or delegations may invoke it or not as they choose Except in the case of presidential primary states, the national convention will, however, recognize and enforce it when ordained by a proper state party authority, and it is always employed by a number of states, especially those in the South

[9] No printed or written ballots are employed all voting is oral. In convention usage however a roll-call for votes is termed a "ballot."

The Democratic "two-thirds" rule abandoned

Until fairly recently, another important difference between Republican and Democratic procedure was that whereas a simple majority of all votes cast was sufficient to nominate in a Republican convention, the Democrats required two-thirds. Although not without some theoretical merit, this rule frequently was responsible for convention deadlocks and sometimes—as in 1924—prevented the party's strongest candidate from receiving nomination. Save for reluctance to change the rules while the game was being played, *i.e.*, while a contest for nomination was going on, the rule probably would have been abrogated by the Chicago convention of 1932. Four years later, the situation was more favorable. President Roosevelt was about to be renominated at Philadelphia without opposition, no candidate's chances would be in any way affected, and as a result the two-thirds requirement was rescinded, with nominations (for both the presidency and vice-presidency of course) thereafter to be by simple majority. Under the old plan, the South usually had been able practically to control nominations by vetoing any considered objectionable. This it no longer could do, and although some compensation was received in the form of increased convention representation, lingering dissatisfaction found expression in vigorous demands at both the 1944 and 1948 conventions that the two-thirds rule be revived.

The balloting

After the votes of all the states have been recorded and counted, the result is announced. Sometimes—especially when a president is being renominated—a single ballot suffices.[10] But often the votes are so divided among a number of candidates that no one obtains the requisite majority and additional ballots must be taken. In the course of these—while, off in secluded spots, party leaders and chairmen of key delegations dicker, make deals, and toss whole blocks of votes around—weaker candidates drop out, and eventually some one of the contestants (or perchance a "dark horse" agreed upon behind the scenes) emerges a victor. Sometimes the balloting (and bartering) is very prolonged, the extremest case on record being the nomination of John W. Davis by the Democrats in 1924 on the 103rd ballot, after a deadlock lasting nine days. With a Democratic candidate, however, no longer needing a two-thirds vote to win, there hardly will be another experience so trying.

Nomination for the vice-presidency

The nomination for the presidency having been made, the weary delegates hurry their labors to an anticlimactic conclusion. A candidate for the vice-presidency still is to be named, and the same procedure—roll call, nominating and seconding speeches, and balloting—is followed. Generally, however, there is no very lively contest and a decision soon is reached.[11] An Eastern presidential nominee commonly calls for a Western vice-presidential nominee,

politician remarked just dropped into the slot

a dyed-in-the-wool conservative ordinarily must be counterbalanced with a man of known liberal views, or *vice versa*, and the preference of the presidential nominee may have a good deal of weight Over the years, the vice-presidency too often has been "lightly esteemed and carelessly bestowed"—though in the past two decades some entirely worthy men have been nominated At all events, with its selection made, the convention goes through the formality of electing a national committee for the ensuing four years (from nominees offered by the state delegations or state primaries) and promptly adjourns *sine die* [12]

## CASTING AND COUNTING THE ELECTORAL VOTE

The campaign

At an early date, the new national committee meets, and a chairman is chosen, nominally by the committee, although actually by the presidential candidate In due time, subcommittees and auxiliary committees are set up, a treasurer is appointed, headquarters are opened usually in both an Eastern and a Western city, a "campaign textbook' (containing the platform, acceptance speeches, biographies of the candidates, and other materials for the use of party workers) is published and given wide distribution, a speakers' bureau is organized, and an appeal for votes is launched which, once the campaign is actively under way (usually by early September) is kept up with increasing resourcefulness and fervor to the moment when, on election eve, the last lc
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man [13]

The presidential electors

Meanwhile, in each state, the respective "slates" of presidential electors are made up by party conventions or committees or through primaries, and ballots are prepared on which (in all states still putting the electors' names before the voters, and at the same time still using paper ballots, at least in part) the lists of electors are printed in parallel columns, under the familiar party symbols, and either with or without the names of presidential and vice-presidential candidates also appearing When the people finally go to the polls, they think of themselves as voting for president and vice president, and, barring certain contingencies very unlikely to arise, they do actually determine who will fill these two high offices Legally, however, they vote only for electors, even though they usually do not know or care who the individuals personally are, and notwithstanding that in 22 "presidential short ballot"

states (nearly all of the larger ones) the electors' names do not even appear on the ballots or voting machines [14]

Choice by legislatures gives way to choice by the people

To many persons it would come as a surprise to be told that presidential electors were not always chosen exclusively or even mainly, by popular vote A national law dating from 1845 requires that they be elected in all cases on the Tuesday following the first Monday in November, but as for the mode of selection there has never been any nation wide rule except a simple constitutional provision that each state shall determine the matter for itself by action of its legislature At the outset the legislature itself elected in a majority of states and the people took no direct part at all As democratic sentiment grew however popular election was substituted in one state after another with the result that after 1832 the legislature elected only in South Carolina and there only until the Civil War

District and general ticket systems

In states in which the electors were from an early date chosen by the people it was at one time not unusual to employ a district system, under which one elector was chosen by the voters of each congressional district and two were elected by those of the state at large The competition of political parties however caused this plan to lose favor Under the district system the electoral vote of a state was likely to be divided among two or more candidates, to win the full vote it was necessary for a party to carry every district The alternative was of course a general ticket system under which a party could make a clean sweep merely by securing a plurality throughout the state as a whole Augmenting as it did the importance of a state in national politics this plan won the support both of party leaders and of public sentiment In 1832 only four states retained the district system and they soon gave it up Michigan reverted to it in 1891 but only temporarily In every state therefore each voter votes for as many electors as his state is entitled to, *e g* 45 in New York, 27 in Illinois

"Minority" presidents

A majority in the electoral college is necessary to victory—unless achieved through election by the House But this does not prevent us from having 'minority presidents *i e* presidents who (speaking strictly the electors who chose them) received fewer than half of the total popular vote cast, as a matter of fact we have had 10 such—two of them at two different times each [15] Lincoln in 1860 obtained more popular votes than did any one of his competitors but nevertheless polled half a million less than a majority of the whole number recorded Wilson in 1912 received 2 million more popular votes than did his nearest competitor Theodore Roosevelt, yet only 42 per cent of the total In both of these cases the opposition was unusually divided But the same thing can happen even if there are only two major tickets in the field Hayes was elected over Tilden in 1876, although his popular vote was about 300 000 smaller, and Harrison triumphed over Cleve-

[14] In a twenty third (New Jersey) the names ann- ... he few areas where printed ballots still are used

[15] The l st w th dates of ... aylor (1848) Buchanan (1856)
Lincoln (1860) ... 1884 and 1892) Harr son (1888)
Wilson ... these instances *e g* Truman in
1948 th ... man d d h s principal opponent but
not more

land in 1888, although with 100,000 fewer votes All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote, and popular pluralities, no matter how small, in a sufficient number of states—no very great number if the list includes states like New York, Pennsylvania, and Illinois with many electoral votes—insure election An opposing candidate may have swept the states which he carried by sufficiently heavy majorities to give him top rating in terms of popular votes But, lacking the requisite number of electoral votes, he nevertheless goes down to defeat [16]

With the entire electoral vote of a state falling to a candidate polling a bare plurality of the popular vote,[17] parties are prone not only to pick their presidential candidate from a border line or "pivotal" state having numerous electoral votes, but to concentrate much of their campaign effort upon such states in the hope of edging through to safe pluralities New York commonly is such a state, and party managers never are likely to forget that in 1884 fewer than 600 popular votes swung that state's then 36 electoral votes to Grover Cleveland, and that it was these votes that made him a victor over the Republican candidate Importance of the prize under such circumstances may tempt to vote-buying and other corrupt or dubious practices

*Casting the electoral vote*

The theory of the constitution is that the electors are officers of their respective states, and it was on this account that the states were left free to determine how they should be chosen The place where each group meets within its state is fixed by the legislature thereof (being naturally, the state capital), and if the electors receive any remuneration, it must come out of the state treasury A federal statute of 1934, however, requires that they meet in the respective states and cast their ballots on the first Monday after the second Wednesday in December following their election And the Twelfth Amendment enjoins that the voting be by ballot, that presidential and vice presidential candidates be voted for separately, that distinct lists be made up showing all persons supported for either office, with the number of votes received by each, and that these lists, signed and sealed in duplicate, be sent to the president of the Senate (nowadays actually to the head of the General Services Administration for transmission to the Senate's presiding officer) at the seat of the national government As evidence of their power to act, the electors must transmit in addition their certificates of election, bearing the signature of the governor

*Counting the electoral vote*

The constitution is explicit enough on most matters, but curiously vague on the counting of the electoral vote The Twelfth Amendment says that "the president of the Senate shall, in the presence of the Senate and House of

[16] In 1940 27 243 466 popular votes yielded President Roosevelt 449 electoral votes, and 22 304 755 yielded Willkie only 82 in 1944 25 607 646 popular votes yielded Roosevelt 432 electoral votes and 22 017 592 yielded Dewey only 99 in 1948 24 104 836 popular votes

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Representatives, open all the certificates and the votes shall then be counted" But who shall make the count? The constitution is silent If conflicting returns are sent in from a state, who shall decide which shall be received and which rejected? Again, the constitution does not say For nearly 100 years, no difficulty arose from these omissions In the Hayes-Tilden contest of 1876, however two sets of electoral certificates—one favorable to Hayes and the other to his Democratic opponent—were sent to Washington from each of four different states and only after an extraconstitutional electoral commission, consisting of five senators, five representatives, and five justices of the Supreme Court had passed upon the evidence was Hayes declared elected, without a vote to spare The country was kept in suspense until within two days of the time for the new president to be inaugurated

The Electoral Count Act (1887)

When the excitement died down, public-spirited men of both parties began looking for some way of preventing similar trouble in the future The problem, however, was a thorny one, and a decade passed before any agreement could be reached Finally, in 1887, an Electoral Count Act[18] supplied at least a partial solution Recognizing that presidential electors are state officers whose right to act is certified by the governor, and who meet and perform their sole task within the state boundaries and under state authority, the new law placed responsibility for settling disputes as far as possible upon the states themselves Any determination of a dispute (it provided) in accordance with a state law covering the subject, and arrived at not less than six days before the time fixed for the meeting of the state's electors, should be accepted as conclusive Manifestly, however, the authorities of a state might fail to arrive at a settlement and conflicting returns still make their appearance at Washington In such event, the two houses of Congress, acting separately, were to decide which certificates should be accepted If, however, as easily might happen, the houses could not agree, any returns having the advantage of being certified by the governor of the state should be honored, and if none came with such endorsement, and the two houses still could not agree, the state concerned should lose its vote in that particular election

Although imperfect, this legislation (still in effect) went perhaps as far toward solving the problem as was then feasible There was doubt about the power of Congress under the constitution to exercise control over such aspects of presidential elections, and there still was no guarantee against a state's vote being forfeited because of inability of both the state itself and Congress to resolve a conflict To be sure, it might be considered that if a state cannot settle its own electoral disputes, it may reasonably be expected to accept the consequences, and it must be added that to this day only a few of the states have provided by law for handling controversies of the kind Disfranchisement under any conditions is, however, undesirable

The electoral count as now carried out

With rare exceptions, of course, the counting of the electoral votes is a mere formality, the country knows two months in advance precisely what the figures will be On the day fixed by law—formerly, the second Wednesday in February, but now the sixth day of January—the members of the two houses

18 24 *U S Stat at Large* Pt II 373 375

gather in the hall of the House of Representatives, with the president (or president *pro tempore*) of the Senate in the chair, and with four previously designated tellers—a Democrat and a Republican from each house—ready to tabulate and count. Starting with Alabama and proceeding in alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies and hands them one by one to the tellers, the latter read the contents aloud and set down the number of votes, and the presiding officer announces the totals, which in due time are entered, with a list of the votes by states, in the journals of the two houses. The person receiving the largest number of votes for president, provided the number is a majority of the whole number of electors chosen, i.e. a minimum of 266 out of a total of 531, is declared elected, and similarly in the case of the vice-presidency.

Provision in case of lack of a majority

In the event that no candidate for president receives a majority, the election is, of course, thrown into the House of Representatives, where each state has one vote, to be bestowed as the majority of the state delegation determines. Until 1804, the choice of the House in such a contingency was to be made between the candidates who were tied, if there was a tie, or among those highest on the list (up to five) if there was simply lack of a majority. The Twelfth Amendment, however, provided for selection among "the persons having the highest numbers not exceeding three," and of course that is now the law—the winner being any one of the three receiving the votes of a majority, i.e., nowadays at least 25 of the states. Since Jefferson was so elected in 1801, the president has been chosen by the House only once, i.e. in 1825, when John Quincy Adams emerged victor over Jackson, Crawford, and Clay.[19] If no candidate for the vice-presidency obtains a majority of the electoral vote, the Senate—the members voting as individuals—choose from the highest two, the victor being required to receive the votes of a majority of the whole number of senators. Vice-President Richard M. Johnson was elected in this way in 1837.

Some recent safeguards

Notwithstanding all the constitutional and statutory regulations on the subject, it still is possible for the country to come up to the expiration of a presidential term with no president elect ready to be inaugurated. Not only may the choice itself still be hanging fire, but a person duly elected may have died before the inauguration date, or may have failed to qualify (as by refusing to serve). Providing belatedly for such contingencies, the Twentieth Amendment, adopted in 1933, specifies (1) that in case of the death of a president elect, the vice president elect shall become president, and (2) that if at the time for inauguration a president elect has not been chosen or has failed to qualify, the vice president elect "shall *act as president* until a president shall have qualified." Conceivably, however, the same situations might arise as to both president elect and vice president-elect, and for this contingency the Amendment authorizes Congress to make provision by law—which, in a Presidential Succession Act of 1947, it has done.[20]

[19] There was, however, a narrow escape in 1948, when a shift of only 3,554 and 8,933 popular votes in Ohio and California respectively would have thrown the election into the House.

[20] See pp. 289-290 below.

## PROPOSED ELECTORAL CHANGES

Present faults

More than once, the mode of electing the president and vice-president has been pronounced the weakest point in our American system of government. Over the years, it is true, improvements have been introduced by the Twelfth and Twentieth Amendments, by federal statutes like the Electoral Count Act, by state legislation on matters such as the presidential short ballot, and by party regulations like those now governing the apportionment of delegates to national conventions But defects remain The electoral college has become useless, candidates sometimes win with only minority popular backing; more important, the unit principle under which a candidate captures all of a state's electoral votes merely by polling a state-wide popular plurality is unfair to sections of a state carried by a different party and contributes to distortion of electoral results

Proposed alterations

Proposals for betterment have been many One will not be surprised to learn that some of them start from the premise that the people should elect directly, with no intervention of either personal electors or electoral votes, and from this advance to the suggestion either (1) that the country be thrown into a single grand constituency, with the people in the mass electing directly, by plurality or majority, without reference to state lines, or (2) that voting continue on a state basis, but with election by popular pluralities in a majority of states Defying all considerations of state interest and pride, and predicated upon a uniform national suffrage and election law which certainly could not be obtained, the first suggestion is simply naïve, while the second, opening a way for a number of smaller states to swing an election by means of only a minority (perhaps very small) of the nation-wide popular vote, is palpably objectionable [21]

The upshot is that every plan considered in any wise practicable presumes continuing final choice by electoral rather than popular votes, the only questions being as to how such votes shall be allotted and whether they shall literally be "cast" by actual persons or be only abstractions mathematically calculated from the popular vote And here, three main plans appear:

1 Abolish the electoral college and simply translate state-wide popular plurality votes into state quotas of electoral votes, all going in each state (as now) to the plurality candidates Long advocated by Senator George W. Norris of Nebraska, a constitutional amendment of this purport twice narrowly failed to secure the necessary two thirds vote in the Senate in 1934 Except for dropping out the electors, however, the plan would amount merely to writing into the constitution what we already have without touching the matter of really greatest significance in any well-considered scheme of improvement, *i e*, getting away from a candidate's securing all of the electoral votes of a state simply by polling a state-wide popular plurality, and notwithstanding that he may have run a poor second, or even third, in important sections To accomplish this major purpose (along with others), we have had two principal proposals, differing chiefly in the manner of proportioning electoral votes to popular votes

[21] The present system also however, somewhat overweights small states because of Senate as well as House seats figuring in the apportionment of electoral votes Thus in 1948, one electoral vote represented 395,040 people in California, 46 667 in Nevada

2 Continue choosing one elector at large in each state by plurality, for each senator and for each representative at large (if any), but choose all others (as was the common practice in early days) district by district so as to make possible, and in most cases probable, a division of a state s electoral votes among different candidates

3 Discard electors, let the people vote directly for president and vice president translate popular votes into electoral votes and allot a state s electoral quota among the candidates in proportion to the state wide popular votes polled

This last proposal, striking more directly at the heart of the problem than any of the others, is the one of late chiefly absorbing attention To implement it, Senator Henry Cabot Lodge of Massachusetts and Representative Edward Gossett of Texas, early in 1948, introduced in Congress a joint resolution proposing a constitutional amendment under which

The Lodge Gossett Resolution (1948 50)

1 The electoral college would be abolished

2, Electoral *votes* would be retained and apportioned among the several states as under the present system

3 The people would vote, not for electors but directly for president and vice president

4 Popular votes in each state would be translated into electoral votes

5 The latter, at every election would be distributed among presidential (and vice presidential) candidates in strict proportion to state wide popular votes polled

6 Any candidate receiving a plurality (rather than as at present a majority) of the country's electoral votes would be declared elected

7 In case of a tie, the candidate having a country wide popular plurality would be the victor

The plan attracted a good deal of bipartisan support, and—after being altered to provide that if no candidate at a given election should receive at least 40 per cent of all electoral votes, choice should be made between the two standing highest by majority vote of the Senate and House (voting as individuals) in joint session—the resolution on February 1, 1950, was approved in the Senate by a bipartisan but predominantly Democratic vote of 64 to 27 as an amendment to be sent to the states For months, the House of Representatives wavered, with party lines broken When, finally, however, the resolution came to a test, the result was unfavorable by a margin of 76 votes (210 to 134) Of late, the project has been dormant, but it has merit and hardly is to be regarded as dead

Meanwhile, with no amendment at all, any state might now, if it chose, institute the district plan, as did Michigan in 1891, or indeed any other plan for proportioning popular to electoral votes—so long as electors were retained, and in this sense the states already have it in their power to solve the main problem involved in the whole matter They, however, cannot be relied upon to do this The same considerations of interest and pride (chiefly the increased political weight accruing from an undivided block of electoral votes) which originally induced one after another of them to give up the earlier district plan would almost certainly frustrate any attempt within their own boundaries to revive it or anything resembling it, and one can by no means be certain that these same considerations, transmitted to the halls of Congress

Reform by state action possible but unlikely

through senators and representatives, will not permanently defeat efforts to attain the basic objective, on a nation-wide scale, by the only means remaining, i e , a constitutional amendment such as that lately throttled in the House Even safely past Congress, moreover, such an amendment would find the road to ratification extremely difficult

## RESULTS OF THE ELECTORAL SYSTEM IN TERMS OF PRESIDENTIAL FITNESS

An uneven record

Some 60 years ago James (later Lord) Bryce included in his classic treatise, *The American Commonwealth* a chapter entitled 'Why Great Men Are Not Chosen President '[22] He did not mean to imply that none such is ever chosen But, looking back over a line of 20 presidents who had served the nation in its first 100 years, our friendly English critic could not see that the people had shown any consistent disposition to elevate even their strongest men (leaving aside the somewhat elusive quality of "greatness") to the highest office in their power to bestow Nor do they seem to have developed any strong inclination of the kind in later days

Some people believe that if the plan of election originally adopted had been adhered to, the general level would have been higher Perhaps it would, though there is no way of proving it In any event, the early rise of political parties, and of such party machinery as the national nominating convention, doomed that system to collapse and brought into operation a wholly different one under which the president became the choice, not (except in form) of the electoral college, nor yet, in any very exact sense, of the people as a whole, but essentially of a political party which having made a candidate its standard-bearer, went on to amass enough votes to carry him to victory Such a party candidate, it is true, is initially named by a gathering of delegates presumed to reflect the sentiments of a large segment of the nation To be sure, too, he cannot reach the White House unless the voters support him in sufficient numbers But at election time they have opportunity to choose among only two or three or half a dozen candidates picked and put before them, and whoever becomes president does so by virtue of having been chosen in the first instance by a party as an 'available" candidate

Unhappily, however, the considerations and circumstances making a man available as a party candidate are not always—perhaps not usually—such as to guarantee that he will attain high rating as president if elected Any one familiar with our national politics can recall plenty of presidential candidates who emerged as party standard-bearers almost as from a lottery Convention deadlocks among strong candidates open the way for compromise on a weaker one, decisions by bosses in hotel hide outs are passed on to harassed conventions as virtual mandates, necessity of carrying a large pivotal state may outweigh all considerations of broader statesmanship

Under conditions such as these, the rough-and tumble of party politics kept Hamilton Gallatin, John Marshall, Clay, Calhoun, Webster, Seward,

[22] Vol I Chap viii

Sumner, Blaine, Hay, and Root from the presidency, while bringing into the office mediocrities like William Henry Harrison, Fillmore, Pierce, Buchanan, and Coolidge, and failures like Grant (*as president*) and Harding Of course it is only fair to remember that the system, within three quarters of a century, gave us Lincoln, Cleveland, the two Roosevelts, and Wilson, also that a good many presidents—Hayes, Arthur, McKinley, Taft, and Hoover, among more recent ones—while lacking any special claim to distinction *as president*, nevertheless proved of at least good average capacity Perhaps, after all, as Lord Bryce commented in a later book, ' things have on the whole gone better than might have been predicted " [25]

Qualities to be sought in a president

Certain qualities, it is manifest, a president must have if he is to be successful, with rare exceptions, he will realize the possibilities of his high office only in the degree to which he possesses them He must be able, he must be diligent, he must be honest, he must be courageous, he must be tactful, he must be capable of making large decisions promptly, intelligently, and in clear-cut fashion, above all, one is tempted to say, he must be a good politician, adept at working with men, managing them, and inspiring their confidence Not all presidents, of course, have fully measured up to these requirements The office has happily been preserved unsullied by personal turpitude, but some incumbents have been too lenient toward self seeking and corrupt men surrounding them No president has been wanting in patriotism, but some have lacked courage and decision, and one or two have been notably deficient in tact Strange as it may seem, two within the recollection of the present generation (Taft and Hoover) were not clever enough at politics for either their own comfort or the country's good The American people make the presidency as they go along But they never find in one man the dignity of Washington, the shrewdness of Jefferson, the force of Jackson, the charity of Lincoln, the conscientiousness of Cleveland, the energy of T R., the learning of Wilson, and the political acumen of F D R

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[24] This volume and the two preceding ones present a complete county-by-county record of presidential election returns for all parties throughout the United States during 50 years

PART III

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# The National Government: Organization, Powers, and Procedures

CHAPTER 13

# The Structure of Congress

From constitutional principles, federalism, citizenship, civil rights, suffrage, political parties, electoral processes, and other basic elements in our political system as a whole, we turn to the governments operating on each of three well defined levels, *i e*, national, state, and local, and while recognizing that all are interlocked, we nevertheless, in the interest of clarity, take them up one by one—and first the national The national government, furthermore, is approached by way of Congress for the same reason that the constitution not only starts with that branch but devotes half of its space to it (apart from the amendments), namely, because—concerned above all with determining policy and giving it expression in the form of enactments enforceable at law (to say nothing of wielding the power of the purse)—Congress enjoys a certain primacy over the nominally coordinate executive and judiciary, at least in the sense that there must first be laws (and money) before laws can be executed or cases heard and decided under them

**The bicameral pattern**

One of the first and easiest decisions reached in the Philadelphia convention of 1787 was that under any resulting new frame of government the national legislature should consist of two houses, and from this resolve the delegates never swerved The decision, moreover, was wise Two legislative houses, it is true, lend themselves to deadlocks and delays, duplication of effort, and diffusion of responsibility A municipality or other local unit of relatively limited powers has little need for one house as a check upon another, and most of our cities, large and small, have dispensed with the cumbersome two chamber councils with which they started Indeed, the plan has been challenged for state legislatures as well, and since 1937 one of the number (that of Nebraska) has consisted of but a single house Many matters falling within the scope of national policy-making, however, are so vitally related to the people's fundamental freedoms that it is a good thing for whatever is decided on this top level to be weighed and shaped and checked by two legislative bodies approaching them separately, and perhaps from different angles, rather than by only one

## REPRESENTATION IN THE HOUSE—THE DISTRICT SYSTEM

Apportionment of seats

Under historic compromise, the Senate is structurally *federal*, with all states represented equally, the House of Representatives, on the contrary, *national*, with representation based on population Even in the House, however, state lines are plainly visible every member is elected within a given state, and every state has its assigned quota of seats [1]

In the constitution as originally adopted, 65 House seats were provisionally distributed to serve until a census could be taken, and thereafter representatives were to be apportioned among the several states "according to their respective numbers" computed by 'adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons" [2] The 'other persons" referred to were, of course, slaves, and this provision will be recognized as one of the constitution's many compromises When slavery was abolished, the three fifths clause became obsolete, and the Fourteenth Amendment now requires apportionment among the states simply 'according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed" [3] The same amendment provides also for a proportionate reduction in the representation of any state withholding voting privileges from adult male citizens of the United States on any ground except "participation in rebellion, or other crime ' As observed earlier, no such penalty ever has been inflicted

Method of reapportionment

The constitution does not expressly say that representation in the House shall be reapportioned after every decennial census, but that is clearly what it means, and for more than 100 years Congress never failed to take the necessary action, usually after a delay of not more than one or two years As population grew and the number of states increased, the "electoral quotient," *i e* the number of people entitled to a member, was repeatedly raised beyond the original 30 000 Yet the membership of the House mounted to the present 435, and when, following the census of 1920 Congress discovered that there was no way of holding the number at that point (certainly as high as it was desirable to go) without reducing the quotas of as many as 11 states, it drew back from the problem and allowed the country to drift a full decade without any reapportionment at all Only in 1929 was the situation corrected by an act providing for reapportionment under the coming 1930 census, and at decennial intervals thereafter In accordance with this legislation (as amended in 1941), reapportionment now proceeds as follows

1 The membership of the House is frozen 'permanently' at 435 [4]

2 After each census, the Census Bureau in the Department of Commerce prepares for the president a table showing the number of inhabitants of each state and the number of representatives to which each state is entitled, figured accord

[1] By courtesy Hawaii and Alaska are allowed one territorial delegate each, and Puerto Rico a resident commissioner Such representatives may speak on matters pertaining to their respective territories and also serve on committees but not vote

[2] Art I § 2 cl 3

[3] All Indians are now subject to federal taxation

[4] Actually for only so long as Congress does not change the figure

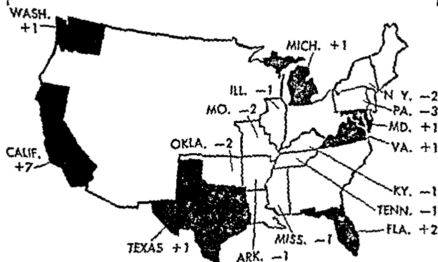
ing to a formula known as "equal proportions" and adopted in 1941 as an alternative to a previous "major fractions" formula

3. The president transmits the information to Congress.

4 The proposed reapportionment takes effect unless within 60 days Congress enacts a different one.

5. The states are officially told how many seats they will have in the ensuing decade, and the legislatures (presumably) proceed to make any necessary rearrangements of districts

**CHANGES IN REPRESENTATION IN THE HOUSE OF REPRESENTATIVES UNDER THE REAPPORTIONMENT OF 1951**




Under this general plan (which has the obvious advantage of preventing the matter from again going by default), a reapportionment based on the 1950 census resulted in a gain of from one to seven seats by seven states and a loss of from one to three by nine To have prevented any state from losing seats would have required raising the total membership to 509

General ticket and district systems

For half a century, members of the House were chosen in some states in single-member districts, in others, on a general, or state-wide, ticket. But the apportionment act of 1842 required every state populous enough to be entitled to more than one representative to be divided by the legislature into districts "composed of contiguous territory," each returning one member; and acts of 1872 and 1901, respectively, added the qualifying terms "equal" and "compact." Curiously, the act of 1929 failed to use any of the terms "contiguous," "compact," or "equal"—indeed did not even require states to

be districted at all, and when, three years later, an effort was made to have a redistricting law in Mississippi set aside on the ground that the seven congressional districts provided for were not composed of contiguous and compact territory, the federal Supreme Court held that the failure to repeat the requirements in the 1929 act by implication repealed them[5] In legal circles, there had been much doubt on the point, and the country at large was hardly aware of what had happened In the opinion of the Court, however, the omissions had not been inadvertent, but intentional, and since new legislation in 1941 was silent on the subject, the former requirements no longer applied when the reapportionments of that year and 10 years later were made[6] It may be added that even when federal law on the subject was entirely explicit, Congress put forth no effort to enforce it upon the states, and that federal district courts holding state reapportionment acts contrary to law because of creating districts lacking in compactness or in equality of population usually were reversed[7]

*Problems raised by the district system*

For reasons to be explained presently, the district system is decidedly superior to the general ticket plan It, however, has drawbacks To begin with, there is the difficulty of laying out districts equitably In each state, the job falls to the legislature, which if that body does its duty, will every time that the state becomes entitled to more or fewer representatives, reconstruct the pattern of districts accordingly But even when intentions are good, the task is not easy In order that a citizen's vote may count for as much in one district as in another, it is essential that districts be as nearly equal as possible in population It also is advantageous not to split counties between two or more districts, and likewise not to partition municipalities except in the case of those, like New York and Chicago, too populous to constitute a single district But constructing a district often becomes a sort of jig saw puzzle, with perhaps several different groupings of counties about equally plausible geographically, though with widely differing political implications

*1 Difficulties of redistricting*

*2 Gerrymandering*

Furthermore the redistricting of a state never can be carried out in the rarefied atmosphere of mathematical abstraction On the contrary, it is beset, both in and out of the legislature, by all manner of personal, community, regional and partisan interests and motivations In particular, there is—in far too many instances—the well known practice of gerrymandering This term dates from 1812, when Governor Elbridge Gerry of Massachusetts inspired, or at all events condoned, a notorious piece of partisan districting in

[5] Wood v Broom 287 U S 1 (1932)
[6] President Truman however urged that Congress revive the earlier regulation including an express requirement of districting and a bill was introduced by Representative Emanuel Celler of New York requiring all states entitled to more th[illegible]

adjourned without acting on the matter

[7] A state rece ving an in rease [illegible]

his state,[8] the practice itself goes back even farther The principle behind the gerrymander (whether applied to city wards, state legislative districts, or congressional districts) is simple 'In districting a state or city, spread the majorities of your own party over all or over as many districts as possible If you have not enough votes to control every district, concentrate the strength of your opponents in as few districts as possible, so that it will do them the least good' Plenty of laws have been enacted to curb the practice but, human nature and party motivations being what they are, the temptation offered politicians who find themselves in a position to control the redrawing of political boundary lines usually is too strong to be resisted Even the statutory requirement before 1929 that states be divided into congressional districts composed of "contiguous and compact territories' seldom deterred legislative majorities from mapping out "shoe string, saddle bag,' and "dumb-bell' districts ingeniously contrived to yield the controlling party the largest possible number of seats at ensuing elections The courts too seldom intervened, while as for the present, all federal regulation having been terminated,[9] only such restraints remain as are imposed by public opinion and by provisions in a few state constitutions

3 Failure to redistrict at all

A final difficulty with the district system is that the legislature of a state, taking advantage of the option allowed by federal law since 1929, and defying custom, may neglect or refuse to redistrict at all It may do this because the party in power stands to gain by keeping things as they are, or because the dominant rural portions of a state do not want to admit large urban populations to more power, or because of simple inertia Down to 1952 at all events, three states had not redistricted since 1912 and 1913 one not since 1911, one (Maryland) not since 1902 one (Arkansas) not since 1901, and one (New Hampshire) not since 1881 With population constantly shifting (especially from rural to urban areas), the result of such negative or 'silent," gerrymandering often is gross inequality of population among congressional districts, with manifest frustration of one of the basic principles of our democracy[10]

Under the general ticket system prevailing in several states before 1842, a party polling a bare plurality of the popular vote for congressmen captured

[8] One of the resulting senatorial districts had the shape of a lizard "Why th s district looks

549 (1946)

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The question of fuller representation for minorities

the entire state delegation, notwithstanding that in some sections of the state the candidates of a different party might have been far in the lead,[11] and the main object of Congress in 1842 in making the district system compulsory was to enable parties with such localized strength to win at least a handful of seats In a rough sort of way, the district plan undoubtedly promotes the representation of minorities, a Republican state is likely to have a few Democratic congressmen and (except in the South) *vice versa* The proportions resulting may however be very rough indeed The strength of a minority party may be fairly impressive in the aggregate, yet so distributed throughout a state as to yield no district majorities whatever, as, for example, when, in Indiana in 1932 the Republicans cast 683 517 votes for congressmen, but the Democrats with 849 821, made a clean sweep From this, as well as from inequalities in the total (as also in the *voting*) populations of districts, it comes about that no House of Representatives even when newly elected, can claim to mirror the political opinion of the country in more than a very general sort of way And one will not be surprised to learn that those who deplore this situation bring forward as a remedy the device of proportional representation under which, if adopted for congressional elections, there would be a return to the general ticket plan, coupled however, not with plurality election, as in earlier days, but with some method of allotting seats (on a state-wide basis or in multi member districts) in proportion to the numbers of popular votes polled by the various tickets Just as in 1842 uniform election by districts was prescribed, Congress might now, of course, require all states to adopt the proportional plan Whether or not desirable, there is no present prospect of this being done

## REPRESENTATION IN THE SENATE—STATE EQUALITY

Some anomalies

In the Senate, we find a branch of Congress constructed, not on the principle of representation of people according to mathematical formula, but on the basis of states as indivisible political units every state, large or small, populous or otherwise, is entitled to two senators, and none may be deprived of its equality with the others in this respect except with its own consent To many persons, this equality of unequals seems unreasonable, and indeed indefensible To begin with, Alexander Hamilton has been proved right in his prediction—contrary to prevailing opinion in his time—that, once the new government was in operation, there never would be a conflict of interests between large states and small states as such Throughout our history, cleavages have run on quite different lines They have been regional, or sectional, *e g*, between parts of the country that were mainly agricultural and other parts devoted chiefly to industry and trade Whether a state was large or small has made little or no difference in its political attitudes and alignments And so it very well can be argued that the precaution taken by the constitution's authors for the protection of the small states has been unnecessary and need not be continued

[11] This of course is what still happens in the choice of presidential electors

In the second place, the spread between the smallest and largest state populations has grown far greater than ever was anticipated, with equality of representation correspondingly more incongruous at least as a matter of statistics New York, with 14,830,192 population, has two senators, Nevada, with 160 083 also has two senators Pennsylvania has about 1 2 million more inhabitants than all New England, [12] but New England has 12 senators and Pennsylvania two The six states of New York, Pennsylvania, Illinois, Ohio, Texas, and California have over 60 million inhabitants or nearly 40 per cent of the total population of the continental United States Yet, in a Senate of 96 members, they have only 12, *i e* 12 5 per cent A Senate majority could, indeed, be made up to represent not more than one fifth of the people of the country

Political significance

Of disparities like these the least that can be said is that they completely ignore the democratic theory of equality of representation in terms of human beings as individuals—to which it can, of course be replied that the Senate never was intended to represent 'human beings as individuals" In any case, there is one very interesting practical result Under our national economy, industry and commerce preponderate in only a few but usually populous, states, agriculture and mining preponderate in many states, more sparsely inhabited With states counting equally in Senate committee assignments, and in voting these more numerous members of the Union inevitably dominate (at least in terms of numbers) with the result of a disproportionate weight for rural (mainly Southern and Western) economic interests as against urban With the balance tending to be redressed in the House of Representatives, where population governs, this may not be harmful But at any rate it partly accounts for the complaints of senatorial tenderness toward farm and allied interests frequently heard in industrial areas

An impracticable proposal

To remedy the situation in a rough sort of way, it sometimes has been suggested that a state be allowed an additional senator for every million inhabitants in excess of some fixed number The proposal however, is little short of fantastic, because to carry it out would require not only a constitutional amendment, but the express consent of every state whose representation would become less than that of some other state—a prerequisite which could not possibly be met Moreover, even if the idea were practicable, there still would be the objection that the increase of numbers would endanger the Senate's efficiency as a deliberative body, and that the tendency to make both houses (already chosen by the same electorate) representative of the same people in the same proportions, rather than, as now representative of numbers and areas respectively, would weaken the reasons for having a second chamber at all Even, too, if senators be thought of as representing people (as in a real sense they do *i e people grouped by states*), they can quite as adequately represent 5 million as 500 000 members of the house now represent constituencies five or six times as numerous as when Congress first was organized, and the president sometimes better represents the people of the

[12] Preliminary figure 1950 census

entire nation than do several hundred locally elected legislators on Capitol Hill

Term and continuity of service

The term of senators is six years Some of the framers of the constitution favored a longer period, indeed, a few advocated election for life But to most persons six years seemed sufficiently long to insure the desired stability and continuity A term of such length puts a senator in a very different position from a representative Unlike the latter, with a two-year term, he has time in a single term to acquire experience, and even to attain a certain degree of leadership, and he can devote himself single-mindedly for several years to public affairs without too much distracting anxiety over reelection Most senators, furthermore, have more than one term, and periods of service running to 18 or even 24, years are not uncommon Continuity of personnel arising from long terms and numerous reelections is further secured by an arrangement under which the terms of one-third of the members expire biennially, with the result that the Senate never finds itself in the position in which the House of Representatives is found every two years—a new body, with greatly altered membership, obliged to organize from the ground up [13] On the contrary, it is continuous and always organized Considerably more than two thirds of its members at any given time have served at least two years, leadership develops slowly and as a rule changes gradually, precedents and traditions are carried along on the current of a never-ending stream

## NOMINATION AND ELECTION OF MEMBERS

Suffrage

The constitution s authors intended the president to be chosen, actually as well as nominally, by a college of electors, and senators by state legislatures The House of Representatives, however, was designed to spring directly from the people, and accordingly the constitution has from the first provided that its members shall be elected every two years "by the people of the several states," defined as including all persons qualified to vote for a member of the "most numerous" branch of their state legislature, [14] and the Seventeenth Amendment, introducing direct popular election of senators, applies the same provision to them

Nomination

Candidates for both House and Senate are nominated as the laws of the several states prescribe, and whereas formerly those seeking election to the House commonly were nominated in their districts by conventions representing counties, towns, or other local units, and those aspiring to the Senate by conventions of state-wide scope, nowadays the direct primary is employed for both purposes in nearly every state

Election

'The times, places, and manner of holding elections for senators and representatives," says the national constitution, "shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or

[13] The original senators were divided into three classes with terms expiring in two four and six years respectively In no case were both senators of a state placed in the same class and the senators of states admitted later were always assigned by lot to different classes Hence barring vacancies arising from death or resignation only one senator is elected in a state in any given year

[14] Art I § 2 cl 1

alter such regulations, except as to the places of choosing senators" [15] For half a century, the regulation of such elections was left entirely to state laws, which indeed still largely govern In 1842, however, Congress prescribed that all members of the lower house be chosen in districts rather than on state wide tickets, in 1872, that all such elections be by secret ballot, [16] and in 1873, that they be held throughout the country on the same day, *i e*, the Tuesday following the first Monday in November of every even numbered year [17] (pre viously, voting was in some instances *viva voce,* and elections were held at widely differing dates) With senators still elected by state legislatures, Congress also, in 1866, passed a law aimed at averting deadlocks and covering other aspects of procedure, and, as we have seen, early in the present century measures began to be enacted regulating expenditures of candidates for both houses in their electoral (although not nomination) campaigns

Contested elections

The constitution makes each house judge of the elections, returns, and qualifications" of its members,[18] and accordingly every dispute involving a seat is decided by the House or Senate itself If a candidate is unwilling to concede his defeat, he may ask for and obtain a local recount of the votes as provided for in the state election laws, and if still dissatisfied, he may carry his case to the House or Senate, where it will be referred in the one case to the standing committee on House administration and in the other to that on rules and administration In its turn, the committee will weigh the evidence, hear the rival claimants and their counsel, take other testimony if desired, and prepare a report recommending that one candidate or the other be declared elected Party considerations are not unlikely to color the decision, and the English plan of turning over such cases to a nonpartisan and disinterested board selected from the judiciary is to be preferred

## ADOPTION AND EFFECTS OF POPULAR ELECTION OF SENATORS

Original mode of election

Aside perhaps from the gradual adoption of the district plan of choosing representatives, the most important change ever made in the election of mem bers of Congress was the introduction of direct popular election of senators some 40 years ago Five or six different ways of choosing senators were considered by the constitution's framers, and election by the state legislatures was finally hit upon as the least objectionable with the proviso that a vacancy arising in any state when the legislature was not in session should be filled by temporary appointment by the governor Certain distinct advantages were, indeed, expected to flow from this method Members of legislatures, it was thought, would be most likely to know the qualifications of candidates, and, being themselves men of substance and responsibility, would choose persons of superior character, experience, and judgment Elected by the legislature,

[illegible] be chosen by state legislatures, it manifestly
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a senator would feel himself the representative, not of a faction or group or section, but of the entire state The national and state governments would be geared together in a significant way, and people troubled lest exalting the former might lead to eventual extinction of the latter would find ground for reassurance

Popular election under the Seventeenth Amendment

In earlier days these considerations were plausible As, however, government became progressively more democratic, the conviction grew that senators, like representatives ought to be chosen by the people directly Nor was it merely a matter of theory, in practice, legislative election showed plenty of defects—recurring deadlocks (even after 1866) leaving senatorial seats vacant for years at a time, boss dictation, virtual purchase of seats, preoccupation of legislators with senatorial elections to the neglect of other business Toward the close of the nineteenth century, a sustained movement for direct election got under way political parties endorsed the plan in their platforms, state legislatures themselves went on record for it, and the lower house at Washington repeatedly passed resolutions proposing constitutional amendments on the subject In a total of 29 states, too, the legislatures were by 1912 finding themselves confronted with senatorial 'nominations" volunteered by the voters in direct primaries, with the result of being practically (even if not legally) obliged to choose among nominees thus offered The decision came hard, but in the year indicated it was made, the Seventeenth Amendment was got through both branches of Congress and in 1913 proclaimed in force Under the new arrangement, senators are elected directly by the people of the several states, and as in choosing members of the other house, the electors include all persons qualified to vote for members of the "most numerous branch of the state legislature " If a vacancy arises, the governor of the state normally issues a writ of election to fill it for the remainder of the unexpired term, although the legislature may empower him to make temporary appointments and nearly all legislatures have done this

Results of the new system

The effects of the change to direct popular election cannot be measured with precision Liberation of the state legislatures from the distractions entailed by senatorial elections has been a genuine gain Deadlocks have been made impossible, and a state's full representation at all times (except for brief intervals following the death or resignation of a senator) has been assured The consequences for the Senate itself are not so clear Since 1913, several hundred senators have been elected or reelected But whether they have been of higher caliber than they would have been under the old method of election, no one can say Certainly the amendment produced no abrupt overturn in personnel Practically every senator who could have expected to be retained in office at the hands of his state's legislature was continued on the popular basis, indeed, contrary to expectation, reelections have consistently been more numerous under the popular system than before Assuredly, too, abuses connected with the lavish use of money in senatorial nominations and elections did not immediately disappear Money now had to be used in a different way, because it was a state-wide electorate that had to be reached But the first decade and a half of popular election saw several instances of what was

considered too prodigal wooing of the voters And although such "scandals" have in our time tapered off sharply, senatorial politics still tends, speaking broadly, to be a game for the well-to do, or at all events for those able to muster strong financial support Certain undesirables, *e g*, self-seeking plutocrats and virtual appointees of avaricious interests, are now pretty well excluded, but others, *e g*, the demagogue, the whirlwind campaigner, and especially the shrewd manipulator of federal patronage, have perhaps better chances than before Popular election is of itself no guarantee of fitness

## QUALIFICATIONS FOR MEMBERSHIP

Constitutional specifications

To be seated in either branch of Congress, a duly elected man or woman must meet four requirements imposed by the constitution [19]

1 He (or she) must, when sworn in, be 25 years of age or over in the case of the House, 30 in that of the Senate
2 A representative must have been a citizen of the United States at least seven years, a senator at least nine years
3 Both representatives and senators must be inhabitants' of the state in which they are chosen—construed to mean legal residents for voting purposes
4 In deference to separation of powers, neither may, when sworn in or at any time during tenure, hold any 'office under the United States"

The last-mentioned restriction is interpreted to debar Army and Navy officers, as well as holders of civil office, and it is hardly necessary to point out that, in disqualifying heads of executive departments, it contrasts sharply with the unwritten rule in Great Britain which requires ministers to have seats in Parliament A federal officer may be elected to either branch of Congress, but must resign his office when taking his seat, and, subject to one restriction, a representative or senator may accept appointment to a federal office, forthwith giving up his legislative seat—the restriction being that the office must not be one which has been created, or the emoluments of which have been increased, during the member's service on Capitol Hill

Can other qualifications be required?

On sundry occasions, question has arisen at both ends of the Capitol as to whether qualifications in addition to those specified in the constitution can be imposed The answer would appear to be both no and yes On the one hand, plenty of court decisions lay it down as a matter of law that neither the states nor Congress may add to or subtract from the qualifications enumerated On the other hand, usage, as every one knows, has decreed almost inexorably—notwithstanding complete silence of the constitution on the matter—that members of the House shall be residents not only of their respective states but of the individual districts which they represent, and in exercising their authority to judge the "elections, returns, and qualifications" of their members, both branches of Congress have at various times excluded persons on grounds quite apart from those constitutionally specified In 1900, for example, the House refused to seat Brigham H Roberts of Utah on the ground that he was a polygamist, and in 1919 Victor L Berger of Wisconsin because of having been

House precedents

[19] Art. I, § 2 cl 2 and Art. I § 3 cl 3

judicially convicted of obstructing the government in prosecuting World War I[20] In both instances, it was argued that if the gentleman in question was deemed unfit for membership, the proper course was to seat him and then expel him,[21] rather than do violence to the constitution by imposing qualifications for admission which that document does not recognize It is easier, however, to exclude than to expel, because in the one case a majority vote suffices and in the other two-thirds is required, and the dubious precedents cited—suggesting the possibility of exclusion for almost any kind of opinion or conduct that a partisan or even vindictive House majority might choose to condemn—still stand on the record

Senate precedents

Asked, in 1903, to seat a senator-elect (Reed Smoot) who, although not a polygamist, was an adherent of the Mormon Church, the Senate took what certainly seems the better constitutional ground, namely, that any person duly elected and having the qualifications required by the constitution must be received, even though he may subsequently be expelled In refusing in 1928 to seat Frank L Smith of Illinois and William S Vare of Pennsylvania, who, although duly certified as elected, had allowed too much money to be spent in behalf of their respective candidacies, the upper house seemingly receded from its previous more correct position—although effort was made to justify its action on the ground that improper receipt and use of funds had invalidated the election of both men However, when in 1941, it seated William Langer of North Dakota, elected regularly enough, but charged (by a group in his own state) with being unworthy of membership, it reverted to its earlier more defensible practice

## PRIVILEGES, IMMUNITIES, PAY, AND PERQUISITES

Privileges and immunities

Members of both houses have certain privileges and immunities, based on hard won English usages, and aimed at protecting freedom of attendance, speaking and voting A senator or representative may be arrested at any time for treason, felony, or breach of the peace—which, as construed, means indictable offenses of every sort, so that he enjoys no exemption from the ordinary processes of the criminal law But while attending a session, or going to or returning from a session, he cannot be arrested on civil process or compelled to testify in a court or serve on a jury Moreover, "for any speech or debate in either house," he cannot "be questioned in any other place"[22] That is, he cannot be proceeded against, outside of the house to which he belongs (it, of course, may censure or even expel him), because of anything he may have said, orally or in writing, in the course of debate, committee hearings, or other proceedings connected with the business of the house He cannot, for example, be sued for libel or slander by a person whom he may have

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[illegible] arded

[22] Art I [illegible]

criticized or attacked[23] The exemption sometimes becomes a shield for intemperate personalities, and even for downright scurrility, but it is fundamentally justifiable If a member knew that he might be proceeded against at law by any person taking offense at his remarks in the exercise of his proper functions, he would speak and act under an altogether undesirable sense of restraint The immunity relates, of course, to legal proceedings only, and quite properly confers no protection against criticism by press and public on grounds of public interest and policy

Pay

One other constitutional right of members is that of receiving compensation, at a rate which they fix by law, always the same for members of both houses, and paid out of the national treasury Until 1815, they contented themselves with a small per diem allowance (six to eight dollars), but at that time a salary of $1,500 was authorized which in 1855 was increased to $3,000, in 1865 to $5,000, in 1907 to $7,500, and in 1925 to $10,000 In later years, demand arose for further increase Senators and representatives testified that living costs in Washington (where the longer sessions of today keep them most of the time), combined with unavoidable expenses incident to their station, made it impossible for them to get along on what they were paid, and disinterested observers joined in the conviction that something ought to be done A new salary figure most commonly in mind was $15,000, and in 1946 the Senate passed a bill providing for that amount The House cut the figure to $12,500, coupling with it, however, provision for an additional tax-free $2,500 for special expenses Somewhat reluctantly, the Senate concurred, and therefore, since the year mentioned, compensation for all members has been as stated, except that the expenses are now taxable[24]

Perquisites

When, in 1942, a somewhat ill timed bill was passed to improve the financial outlook of members by assuring them retirement annuities on a graduated scale after 15 years of service, a storm of public disapproval caused the measure to be repealed within two months The legislation of 1946, however, gives all members opportunity to qualify, on a contributory basis, for participation in the general federal retirement and pension system, with annuities starting (after at least six years of service) at the age of 62 and graduated according to the duration of service In addition to salary, funds for special expenses, and provision for retirement allowances, members are entitled to

1 A base pay allowance up to a maximum of $12,500 a year for secretarial help for members of the House of Representatives and in the case of senators a maximum of $10,846 for one "administrative assistant," of $9,617 for one "executive secretary," and additional sums for clerical help graduated according to state populations

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of the Senate, however,

2 A travel allowance for one round trip each session between the member's home and Washington at the liberal rate of 20 cents a mile—intended, however, to help meet the cost of transporting a family

3 The franking privilege enabling members to send free through the mails personal correspondence printed speeches and other materials stamped with their names

4 *Liberal allowances for telegraph and telephone service*

Every year also many members receive free travel and maintenance in connection with observational and investigative trips (sometimes referred to by the skeptical as junkets"), which may take them to the most distant parts of the earth

## CONGRESSIONAL PERSONNEL

Social back grounds

What kinds of men and women do the voters send to Washington to represent them in the House and Senate? One might reply, 'Nearly all kinds', for the 531 representatives and senators constitute in many ways (although not in all) a good cross-section of the nation itself A recent careful study of a particular Congress (the Seventy-seventh, 1941-43), brought to light characteristics that can safely be regarded as fairly typical under present-day conditions,[25] and a few of them may be noted here To begin with, the average age of representatives was 52 and of senators 58—considerably beyond the average age of the adult population generally (43) Nearly all were firmly rooted in the states, and even in the localities (in the case of representatives), which they represented, by virtue either of having been born there or of having become resident there at an early age Different religions were represented in rough proportion to their numbers of communicants throughout the country In other ways besides age, the situation was less typical of the people as a whole Eighty-eight per cent had attended a college, professional school, or both—which, of course, is a far higher proportion than among adults generally And, as one would expect, a disproportionate number had held previous public positions of one kind or another, for example, 156 had served in state legislatures and 109 as prosecuting attorney

Voca tional connec tions

Vocationally, the outstanding fact was the preponderance of lawyers—although not all of the 311 members listed as such were actively practicing at the time of their election Other professions, *e g* , agriculture, journalism, and education, were represented more sparingly, and along with them, a variety of business and financial interests Although "dirt farmers" were not numerous, agriculture claimed approximately one tenth of the membership—with, of course, the entire membership from agricultural states counted upon to be sensitive to agricultural interests The man most conspicuously absent was the manual laborer, only a single member listed himself as a factory worker, although probably a few others had at one time or another been such Hardly any interest is more vocal around the Capitol than labor But those

[25] M M McKinney "The Personnel of the Seventy seventh Congress, *Amer Polit Sci Rev* XXXVI 67 75 (Feb 1942) A similar survey of a slightly later Congress (the Seventy ninth 1945-47) yielded almost identical results See G B Galloway *Congress at the Crossroads* (New York, 1946) Chap II

who speak for it do so either as lobbyists from the outside or as members concerned about labor management relations and policies without themselves ever having riveted a girder or stood at the assembly line

Beyond all other characteristics, the American Congress is middle class, economically and socially, with its most typical figure a county-seat lawyer, 50 or 60 years old, serving perhaps his third or fourth term, comfortably fixed but not affluent, a church member, an Elk, a Mason, or an Odd Fellow, a substantial citizen but not widely known outside of his district or state, a good American primarily in terms of the ideas and interests of the folks back home, a doubter when theorists and "experts" are involved, a Democrat or Republican largely by inheritance or environment, a well-meaning servant of the people with a grand strategy centering chiefly in securing reelection [26]

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[26] For a biography of an imaginary typical congressman see J M Burns *Congress on Trial* (New York, 1949), Chap I

## CHAPTER 14

# The Organization of House and Senate

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Congresses

The two year period for which a House of Representatives is chosen fixes the duration of 'a Congress', at its expiration, a new Congress, with new membership and organization, begins Since the first one met in 1789, Congresses have been numbered consecutively, and the sessions of each—whether regular or special—are identified officially as the first or second (or third) as the case may be The Congress elected in November, 1950, and organized in January 1951, was the eighty second in the series

Sessions

The constitution requires that Congress "assemble" at least once every year, and hence every Congress has two regular sessions, in addition, it may, "on extraordinary occasions," be called into special session by the president With the terms of all representatives (and of one-third or more of the senators) beginning on January 3 following election, the first regular session of a new Congress starts on that day unless the two houses have agreed upon a slightly different date, *e g* to avoid Sunday The second regular session operates on a similar schedule the next year, and both sessions may run as long as desired within a 12-month period—although the Legislative Reorganization Act of 1946 specifies that, except in time of war or other national emergency, the two houses shall adjourn *sine die* each year not later than the end of July "unless otherwise provided by Congress" Constitutionally adjournment is left to the houses themselves, save only that if they cannot agree, the president may adjourn them to 'such time as he shall think proper " No president, however, has ever found it necessary to exercise such authority

### HOW A NEW CONGRESS ORGANIZES FOR WORK

What happens when a new Congress meets

1 The Senate

One who would understand the facilities with which Congress carries on its work will do well to begin by observing how a newly assembled Congress organizes In the Senate, it is true, not a great deal happens Because of overlapping terms that body has a continuous existence and never has been without organization since it first met in 1789 At the opening of a new Congress, about all that is necessary is to swear in the new members, fill vacant offices (if any), and revise the committee lists in accordance with changes in Senate personnel and in the number of seats held by the different parties

**2 The House of Representatives**

The situation in the House is quite otherwise All members of that body reach the end of their terms at the same time, and with them disappear all officers, all committees, and even all rules, when a new Congress convenes, the House is merely a group of unorganized members-elect Some one, of course, must take the initiative in getting action started, and by long-established usage (now embodied in a statute) this responsibility falls to the person who has been clerk of the preceding House Taking the chair, he calls the group to order and reads the roll of members elect by states alphabetically If it appears that any seat is claimed by a person other than the one holding a certificate for it, the matter is referred for investigation and report (after the House has fully organized) to the standing committee on House administration In the meantime, the person named in the certificate is presumed to have been duly elected, and he participates both in the organization of the House and in its regular work after organization until such time as it is determined that he is not entitled to a seat

*(a) Reading of the roll*

*(b) Election of officers*

The roll having been read, the work of organization proceeds As a rule, it is completed quickly—sometimes in a single sitting—although a tight balance of political forces may give rise to a deadlock extending over days, and even weeks The first important step is the election of a regular presiding officer, *i e* a speaker, who forthwith takes the chair After that, a clerk is chosen, and also a sergeant at arms a doorkeeper a postmaster, and a chaplain While the constitution explicitly provides that all of these officials (without naming any except the speaker) shall be elected by the House, what actually happens is that the House merely ratifies a slate previously agreed upon by a caucus of the majority members and while, as a matter of practice, the speaker (voted for separately) is always taken from among the members, the others (usually voted for as a group) are always non members

*(c) Taking the oath*

The speaker elect is escorted to the chair by the minority party's defeated candidate and sworn in, usually by the member of longest service In turn, he administers the oath to the members as a body, except that any whose seats are in question must wait until their right to membership has been established Once having taken the oath, a member can be cut off from official connection with the House (in advance of the expiration of his term) only by death, by resignation, or by expulsion by a two-thirds vote of his fellow-members

*(d) Adoption of rules*

After officers have been elected and the oath administered, it is customary for one of the older members of the majority party to move adoption of the rules as they stood during the preceding Congress If—as often is the case—there are members who think that changes ought to be made, this is the time for them to say so, for, once the old rules have been readopted, they are almost certain to stand throughout the remainder of the session without significant amendment Regardless of party, the older and more 'regular' members (especially the leaders) commonly prefer to keep intact the procedures under which they perchance have risen to power, most new members are too inexperienced to have strong opinions one way or the other, and insurgent elements bent upon change usually lack the votes necessary to attain their purpose The old rules having been riveted down, all further proposals for

change are automatically referred to the committee on rules—a group, however, usually even more wedded to the status quo than the general run of members, and as a result, any suggested amendment in any wise threatening the continued control of the established leaders in House affairs is likely to be bottled up and never heard of again, at least until the next Congress organizes.

(e) Election of committees

A final principal step in the organization of a new House (aside from notifying the president and Senate that the body is organized and ready for work) is the election of committees—a procedure to be explained, however, when the committee system comes up shortly for consideration.

## THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

A chairman becomes a dictator

The constitution touches upon the internal organization of the House only to the extent of authorizing the members to "choose their speaker and other officers." No attempt is made to define powers and functions, and for awhile after 1789 the speaker had little to do beyond keeping order, putting questions to a vote, and signing bills and other documents. This modest rôle, however, did not last long. As the House grew in numbers and legislative business expanded, need for guidance developed, and, with no other source provided the speaker, as leader of the majority party and in a sense head of the entire House, soon was found supplying it. Between the time of the colorful and forceful Henry Clay (thrice speaker during 1811-25) and the equally colorful and forceful Joseph G. Cannon (speaker in 1903-10), a simple chairmanship grew into a virtual dictatorship carrying the power of life and death over almost everything that the House undertook to do.

The revolution of 1910-11

In earlier days, all standing as well as special committees were chosen by the House itself, but the power had been allowed to slip into the hands of the speaker alone. Included in the list, too, was the key committee on rules, able arbitrarily to thrust measures forward and practically force their adoption, or on the other hand to hold them up and defy the House to get at them, and the speaker not only was a member of this super-committee, but its chairman and dominating figure. In 1910, a long-simmering revolt against "Cannonism," instigated by a coalition of Democratic minority leaders and progressive Republican "insurgents," boiled over in a "revolution" culminating first in removal of the speaker from the rules committee and eventually, in 1911, in restoration of the selection of all standing committees to the House itself, where indeed in theory it always had been. The blow to the speakership was severe, and never since has the office been quite the same.

Present powers and functions

Nevertheless, the speaker still is the most commanding figure in the House, and as such he has many important things to do. He takes the chair at the hour appointed for a sitting, sees that the journal of the preceding sitting is read, preserves order and decorum, and, in case of disturbance or disorderly conduct, causes the galleries or lobbies to be cleared. He "recognizes" members desiring the floor. He signs all acts, addresses, joint resolutions, writs, warrants, and subpœnas ordered by the House, interprets and applies the

rules, decides questions of order (subject to appeal to the House, very rarely invoked and almost never successfully), puts questions to a vote, appoints select and conference committees, and determines to what standing committees bills shall be sent whenever his aid and adviser, the parliamentarian, is in doubt. As a member of the House in full standing, he has the same right to speak and to vote as other members, although he is not required to vote except when the House is voting by ballot or when his vote would decide the issue, as by breaking a tie.

*The speaker as a party man*

Though at one time active, even a leader, in political strife, the speaker of the British House of Commons—prototype of parliamentary speakers throughout the English speaking world—long ago became a wholly disinterested and impartial moderator, identified with no party organization or movement inside or outside of the body over which he presides. Both in Congress and in the state legislatures, on the other hand, the American speakership has developed on quite different lines, in every case it is and practically from the beginning has been, quite frankly partisan. The speaker in Congress, it is true, must not be swerved by party considerations from faithful enforcement of the rules of the House. If he is wise, he will strive to be fair in his treatment of the opposition. He even may win encomiums from his political opponents—as did Speaker Longworth—for protecting their interests and rights. But, wholly unlike his English counterpart, he is actively and openly identified with his party's organization in the House—an indispensable cog in the majority machine. In the days of Reed and Cannon, he was a party figure second only to the president himself, even yet, he usually must be accorded front rank not merely in legislative influence, but in politics as well.[1]

*Some well known speakers*

With few exceptions the speakers of the House have been men not only of well tested ability, industry, and tact, but also of sufficient aptitude for leadership in their respective parties, in proof of which one needs only to glance over the list of nearly 50 persons who have held the office and observe the names of Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, Joseph G. Cannon, Champ Clark, John N. Garner and the present incumbent, Sam Rayburn. Despite, however, the high political importance attaching to the position in times past, only one speaker (Polk) ever reached the presidency, although Blaine missed it narrowly.

## THE COMMITTEE SYSTEM IN THE HOUSE OF REPRESENTATIVES

Legislative bodies the world over save time and otherwise promote efficiency by referring most matters coming before them to committees for examination and report, and both our House of Representatives and Senate at Washington not only make use of special and conference committees, set up

[1] Chosen in the first instance by a caucus of the majority party members, and afterwards formally confirmed by the House, a speaker ordinarily may expect to be reelected at the beginning of each succeeding Congress as long as he remains a member and his party in control.

from time to time as need arises, but maintain an array of standing, or "regular," committees as well[2] In the Senate, standing committees are continuous, with only revisions of personnel every two years, in the House, they are made up anew at the opening of each Congress—although also with much continuity of membership

Standing committees

1 Number and size

Although long relatively small, the number of standing committees mounted to the amazing total of 61 before a reorganization in 1927 brought it down to 47 (increased in 1945 to 48)[3] Even when this reduction took place, it should have been carried farther, because many committees survived which had little or nothing to do important fields of legislation were split between rival groups, jurisdictions overlapped and confusion continued Committees, however, and especially committee chairmanships, represented vested interests, and not until 1946 was it found possible to "streamline' the overgrown structure (in both houses) on a new pattern put into operation in January, 1947[4] In the House of Representatives, (1) the number of standing committees was cut by more than half, *i e* to 19, (2) committee jurisdictions were redefined to eliminate overlapping and give each surviving committee a definite and reasonably logical field of activity, and (3) whereas formerly membership had ranged from two to 42 (in the case of the committee on appropriations), with 21 the commonest number, a spread of from nine to 43 (now 50) emerged with 25 or 27 the most usual figure

The present list, with number of members, is as follows

2 The present committee list

Agriculture, 30
Appropriations 50
Armed Services 35
Banking and Currency, 27
District of Columbia, 25
Education and Labor, 25
Expenditures in the Executive Departments 27
Foreign Affairs 27
House Administration 23
Interior and Insular Affairs, 27
Interstate and Foreign Commerce 30
Judiciary, 29
Merchant Marine and Fisheries, 27
Post Office and Civil Service, 24
Public Works 27
Rules 12
Un American Activities, 9
Veterans' Affairs, 23
Ways and Means, 25

3 Assignments per member—meetings

Under previous arrangements, representatives might be assigned to only one major committee, although also to any number of lesser ones, and the majority rarely served on fewer than four or five In the new system, with committees less than half as numerous, members uniformly serve on only one, except that members of four committees likely to be less hard worked, *e g*, on the District of Columbia, may serve on a maximum of two Previously, somewhat over a third of the more important committees met regularly on a certain day (or days) each week throughout a session, while others met, if at all, only on call of their chairmen Under the new scheme, all committees have a good deal to do, and ordinarily find it necessary to meet at least once

[2] There is also in the House although not in the Senate an exceedingly important device known as the committee of the whole See p 244 below

[3] Forty six if three then existing committees on elections be viewed as in effect one committee organized in three branches Lists of House committees with the names of members long have been printed in successive issues of the *Official Congressional Directory*

[4] See p 270 below

a week, with also slightly more use of subcommittees than formerly. In any event, all except the appropriations committee are required by the legislation of 1946 to "fix regular weekly, biweekly, or monthly meeting days, and 9 of the 19 have done so." Without special leave, no committee except that on rules may sit while the House is in session.

**4. Method of selecting committee members**

As we have seen, standing committees, since 1911, have been elected by the House itself, even though what that body actually does when a new Congress opens is merely to ratify lists of committee assignments prepared in advance by committees of selection set up by the respective party contingents having claim to be represented. With only rare representation of third parties, the committees consist of Republican and Democratic members, in proportions fixed nominally by agreement between the majority and minority leaders, but in fact essentially by the majority's committee of selection, and so as to reflect, at least approximately, the relative number of seats possessed.[6] Each party, of course, is free to determine for itself who of its members shall represent it on each of the committees. The committee of selection, or "committee on committees," to which the Republicans intrust the preparation of their lists is named by the party caucus, or conference, and consists of one member from each state having Republican representation in the House—each such member having, however, as many votes as there are Republican congressmen from his state. The Democrats, in caucus, first select their quota of members of the future ways and means committee, and then delegate to this group the task of making up the Democratic lists for all of the remaining committees. With majority and minority lists (approved by the respective party caucuses) before it, the House rarely consumes much time in carrying out the formality of election. Members entitled to new assignments almost invariably seek to be placed on committees having to do with matters, such as agriculture or labor, of special concern to their particular districts, although, of course, such preferences cannot always be met.

**5. Committee chairmanships and the principle of seniority**

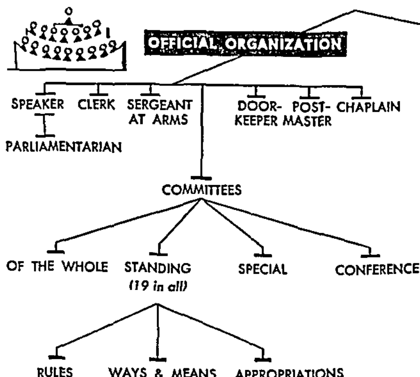
Each committee therefore is composed of majority and minority members, with the majority always holding the chairmanship and (except in rare instances in which party lines break) completely in control, yet significantly with the minority almost always in a position to obtain a hearing for its views. Except on rare occasions when questions of party regularity are involved, chairmanships are awarded on a basis of seniority, that is to say, the majority member of longest continuous service on a committee will almost as a matter of course be put up by the party nominating authority for the chairmanship. Indeed, the same seniority principle applies to the ranking of all committee members: majority members are listed according to their periods of service, minority members likewise, and all move up on their respective lists as members nearer the top drop out by death, failure to secure reelection, or possibly withdrawal in order to accept membership in a different committee. A new congressman, therefore, regardless of how eminent or able he may be, has

[6] Thus in the Eighty-second Congress (organized in January 1951) with 234 Democrats and 199 Republicans in the House, the commonest ratio on standing committees was 14 or 15 Democrats to 11 or 12 Republicans.

no chance at all to secure the chairmanship of a single committee, or usually even a very high place in any committee's rank and file Indeed, he counts himself fortunate if he draws assignment to a lowly position on a committee of first rather than second rate importance Starting (as a majority member, let us say) at or near the bottom of his party's quota, he will, of course—if the people back home send him to Washington often enough—gradually make his way up toward the chairmanship as members ahead of him drop out Arriving finally at second place, he will be known as "ranking majority member', and when the next vacancy occurs in the chairmanship, his claim will be held superior to that of any other member (providing his party is still in control of the House) even though he may be out of step with and *persona non grata* to the bulk of his party Capture of the House by the opposing party will leave him high and dry, as simply ranking minority member, who, however, if party fortunes change soon enough, will yet step into the chairmanship If worse calamity befalls and he drops out entirely for a term or two, he must —no matter how experienced or competent—start again at the bottom

Seniority criticized

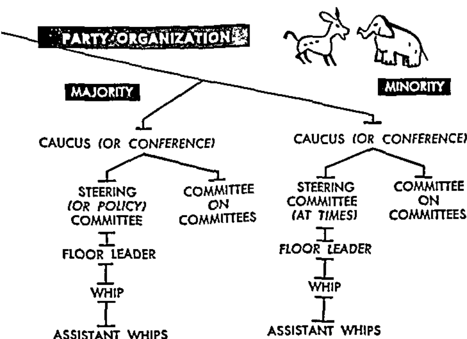
Manifestly disregarding substantially all qualifications except length of continuous committee service, this method of allotting chairmanships has provoked a great deal of criticism, and failure to make any change in it has been charged up as a serious shortcoming of the legislative reorganization carried out in 1946 In logic, there is little to be said for the plan True, it guarantees chairmen who have had long experience with their committee s



field and function, and in view of the heavy responsibilities they carry, that is worth something It also averts the conflicts, intrigues, and deadlocks that probably would occur if chairmen were chosen anew every two years under some wide-open system It affords some chance for members to rise to positions of power regardless of the importance of their state It has brought to the chairmanship of the greater committees men of ability and distinction

*This conceded, however, the system still leaves a good deal to be desired* If old timers rising to significant chairmanships prove high minded, industrious, and statesmanlike, Congress and the country are simply lucky For the plan offers no guarantee of such a result, on the contrary, it holds back men of taste and capacity for committee leadership, thrusts forward others of little aptitude or ability, and asks nothing of a man on his way to the top except that he simply keep on living, get himself reelected, and remain on the same committee Many times congressional leaders and even the committees concerned, would prefer chairmen other than those emerging by seniority There are, however, arguments both ways The diligent joint committee which did the spade-work for the Reorganization Act of 1946 could make no recommendation on the subject because its members could agree on none And with the system as deeply rooted in congressional *mores* as it is, any early change appears unlikely

Of the still fairly numerous regular House committees, only one calls for a word of comment here, *i e* the committee on rules, certain others will re-



6 The committee on rules

ceive attention at later points After having long been only a special committee functioning when a new House was adopting its rules, the rules committee in 1880 became a standing committee, and during the next three decades, orders of the House and rulings of the speaker (himself dominating the committee) invested it with quasi-dictatorship in House affairs As matters still stand

1 This committee receives all proposals for amending the rules of the House, with power to smother them if deemed likely to impair control of business by the House 'machine

2 It receives from committee chairmen all bills acted upon favorably by subject matter committees and can either help them on their way by bringing in special rules or orders placing them before the House for attention or, on the other hand bottle them up

3 It can at any time bring forward an order or rule limiting the time allowed for debate on a given measure or indicating the sections that may, and those that may not be amended, or specifying the number and even the nature of permissible amendments or in other ways determining the conditions under which the work of the House in a given situation shall proceed—with a regimented House majority commonly voting a resolution approving whatever is proposed [6]

4 Specially privileged in obtaining the floor it may at any time (with slight exceptions) interrupt debate by introducing a rule thrusting forward some entirely different bill or resolution irrespective of the regular order of procedure

5 Indeed it may itself draft a bill overnight introduce it in the House the next afternoon and force its passage the same day without opportunity for so much as reference to a subject matter committee

Working in close conjunction with such agencies of the majority party as the speaker, the caucus, the steering committee, and the floor leader, and frequently the instrumentality through which their will is carried out, the committee (or the majority members of it) sometimes expedites business in an altogether desirable way, but also often holds up, sidetracks, or entirely blocks programs of action in which sizable portions of the House are interested [7]

## PARTY ORGANIZATION IN THE HOUSE

The speaker and other officers, the committees and their chairmen (including the powerful rules committee), are agencies of the House as a whole, designed to enable it to carry on business in an orderly and efficient manner In

bringing to the floor measures subsequently passed

addition, however, the members of each political party maintain machinery of their own in the case of the majority, a caucus (Republican congressmen prefer the term "conference" [8]), a steering or policy committee, a floor leader, and a whip and assistants, in that of the minority, the same with sometimes omission of the steering or policy committee And so potent are such extra-legal instrumentalities that those of the majority often are referred to as the 'invisible government' of the House—even though their activities may be, and usually are, no less open and 'visible" than those of officers and committees known to the rules

1 The majority caucus (or conference)

A caucus consists of the members of the House belonging to the majority or minority party as the case may be, organized under a chairman, and functioning either directly through privately held meetings or indirectly through agencies like the steering committee From the fact that nowadays both parties convoke their caucuses less frequently than formerly and leave decisions more largely to a few leaders, it has been deduced that the caucus no longer is a significant factor in the legislative process, and unquestionably the device has waxed and waned through the years The emphasis placed upon the point by some observers is, however, exaggerated In the first place, the majority caucus still functions actively in organizing a new House It prepares the slate of officers which a new House unfailingly elects Through the medium of its "committee on committees," it designates the majority members (and chairmen) of all standing committees, subject, of course, to House election Directly or indirectly, it names the majority steering committee, floor leader, and whips It considers whether changes in the rules are desirable, and decides what ones, if any, to instruct the rules committee to propose for adoption [9] On its part, the minority caucus similarly nominates officers, makes committee assignments, and sets up 'invisible" machinery, and any crisis in party affairs, or any situation requiring significant changes of official or committee personnel during a session, may bring into action the caucus of the party concerned

In the second place, the caucus may be convoked (and occasionally is) to formulate the party's position on proposed or pending legislation Formerly, both Republicans and Democrats made frequent use of such discussions The broad outlines of bills might be debated and decisions reached concerning them, the majority members of important committees might be directed to see that committee reports were presented first to the majority caucus and only afterwards to the House as a whole, decisions might be reached upon what measures to press, what ones to hold back, what ones to prevent from ever being debated at all For reasons not altogether clear, the caucus no longer functions so actively in this way Even for purposes of policy determination, however, it is not dead Rather, it stands silently in the background, always capable of being called into action, and if a handful of managers seem to be running the party's affairs in the House and making its decisions, closer ex-

amination will show that they, after all, serve only as caucus instrumentalities They can be replaced by the caucus at any time

*2 The steering committee*

Two principal agencies through which the majority caucus functions are the majority 'steering committee' and the majority floor leader [10] The steering committee (now called 'policy" committee by the Republicans) consists of a varying number of influential majority members designated wholly or partly by the caucus with due regard for geographical distribution, to represent it in planning party strategy and making it effective Working more or less behind the scenes it keeps the parliamentary situation in hand, whips faltering members into line, and in sundry ways sees that the will of the majority leaders—perchance of the caucus if it has expressed itself—is carried out The committee's main business is (1) to select from the great mass of bills crowding the House calendars those which the majority managers want to advance to final consideration and (2), after these have been decided upon to keep the tracks clear—with assistance from the rules committee—for favorable action upon them Its hardest work is likely to fall in the final crowded days of a session

*3 The majority floor leader*

Acting under general direction of the steering committee, of which he is chairman the majority floor leader is almost equal in power to the speaker, from whom indeed, he has inherited some of his prerogatives, and to whose office he may reasonably aspire to succeed [11] As chief strategist, he keeps informed on the drift of opinion among the majority members, persuades and admonishes in the interest of party harmony, plans the course of debate and indicates to the speaker what members are to be given the floor on particular measures directs the activities of the whips, confers with the minority floor leader on the length to which debates shall be allowed to run and the times at which votes shall be taken and convokes the party members in caucus or conference as occasion arises If one were asked to indicate the two individuals wielding most power in House affairs he would not go far wrong in naming the speaker and the majority floor leader

*4 The whips*

The majority whip, if a Republican, is named by his party's committee on committees and if a Democrat, by the majority floor leader, and he may appoint any number of assistant whips up to a dozen or more, commonly selected with a view to wide geographical distribution A familiar duty of the whips is to see that the party members are at hand when significant votes are likely to be taken But equally important is canvassing members to find out their attitudes on issues and policies for the guidance of the floor leader and the speaker

*The power of the party leadership*

From all this it is obvious that a person who views House organization and procedures merely through the medium of official machinery and formal rules will gain only a very imperfect understanding of how the work of Congress actually is performed Speaker, rules committee, other committees, function —not as agencies or authorities apart—but as cogs in a larger machine which

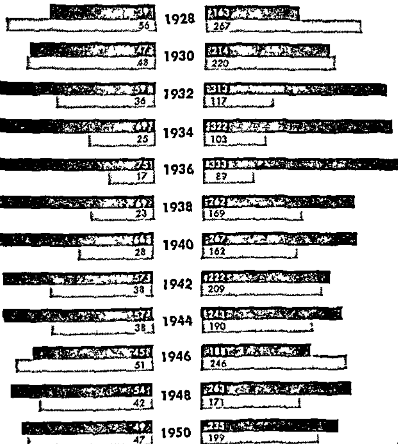
[10] A third is the party contingent on the rules committee but we are here talking about only *party* not *House* machinery

[11] As did Floor Leaders Byrnes in 1935 Bankhead in 1936 Rayburn in 1940 and Martin in 1947

## MAJOR PARTY STRENGTH IN CONGRESS, 1928-50

DEMOCRAT REPUBLICAN

SENATE HOUSE




*(By number of seats and percentage)*

*Divisions of seats based on election results of the respective years Seats won by minor parties account for the fact that figures do not always total 96 for the Senate, 435 for the House and 100 percent for Democrats and Republicans combined*

includes also the extralegal party instrumentalities mentioned Back of all else stands the majority caucus, whether continuously active and assertive or intermittently dormant, because even the speaker owes his position to caucus selection and is expected to lend himself loyally, in so far as the rules give him leeway, to seeing that opportunity is provided for decisions made by the caucus, directly or through its agents to be carried out Even in its periods of greatest activity the caucus, of course, does not concern itself with everything coming before the House, no more do such of its agents as the steering committee There is no point to stirring party machinery to action on the many items of business on which party lines will not be drawn [12] Furthermore, in their present mood, most congressmen prefer to be free agents, voting as they please rather than under caucus or other directives Recognizing this, the Republicans seldom attempt to bind their members even when a caucus is held and a line of action laid down, while the Democrats, although making caucus action on a question of policy or principle binding if supported by a two-thirds vote (provided the two-thirds constitutes a majority of the full Democratic membership of the House) *nevertheless obligate no one on a question of* constitutional construction or on a matter on which the member has received instructions from or made pledges to his constituents Whether or not caucus action is involved, members of both parties are, however, in general, *expected* to support the decisions reached by their accepted party leadership in the House, and habitual failure to do so usually can be depended upon to have unpleasant consequences

## THE SYSTEM CRITICIZED

The quest for leadership

Needless to say, the power of the interlocking majority party agencies enumerated—caucus *steering committee, floor leader, speaker, and chairmen of* rules and other key committees—and the ways in which that power is sometimes employed stir much discontent Stifling of individual initiative, penalizing of independence, relentless use of the "steam roller," drive spirited members to insurgency and inspire attempts to build up *blocs* cutting across caucuses and party lines Although effective functioning of such a body as the House of Representatives imperatively demands leadership, no provision for such is made in the constitution or the laws The president, it is true, sometimes supplies a good deal of leadership on larger matters, certainly such chief executives as Woodrow Wilson, Franklin D Roosevelt, and Harry S Truman have done so The president, however, is at the White House, not on Capitol Hill *and such leadership as the House must have within its own* ranks it has been obliged to develop for itself This it has done according to no preconceived plan but largely as the exigencies of party politics have dictated The results have been different in different periods Once it was the speaker who dominated Again (after the rules committee became elec-

[12] In a typical recent session (the second of the Eighty first Congress in 1950) only 142 of 1 704 measures passed were debated to the extent of three or more pages in the *Congressional Record*

tive), the speaker and "rules" shared control Still again, it was the majority caucus Nowadays—as for a good while past—control is perhaps to be regarded as potentially in the caucus, but actually and practically in the speaker, floor leader, and chairmen of rules, ways and means, and other major committees—which, of course, means that it is considerably dispersed and frequently difficult to locate, although in any case gathered *somewhere* within the hands of an interlocking, majority, managerial directorate In all periods, individuals and groups finding themselves with less independence and power than they believed rightfully theirs have manifested dissatisfaction, revolt against "dictatorship' has followed revolt, only—speaking broadly—with the result, at best, of transferring supreme control from one point in the system to another

Justification for the existing arrangements

The present control devices do not, of course, lack defenders, and some of the arguments employed have a good deal of validity There must, we are told, be not only routine rules and procedures, but people who will assert themselves as leaders, and means by which those who lead can get things done To members whose policies and desires meet with frustration, such leaders inevitably will seem arbitrary and their methods harsh But, once in power, these same members would most likely develop a leadership with precisely the same characteristics The system as it stands must therefore be regarded as reflecting the general will of the membership At all events, a dissatisfied majority can change it at any time—just as, in 1949, it temporarily curbed the authority of the rules committee An arbitrary speaker can be overruled, or even deposed by a majority vote Any special rule or order brought in by the rules committee can be rejected in the same way Either this committee or any other can be compelled to report upon any matter referred to it Therefore, runs the argument, since the entire set up, both official and unofficial—both legal and extralegal—goes on with little change from Congress to Congress, it must be fairly satisfactory to all save a few unreasonable members unable to adapt themselves to the ways of majorities

But what of majority rule?

The argument is plausible, yet it does not quite cover the case The difficulty is that, upon analysis, the alleged majority very well may turn out to be no majority at all A speaker, for example, mounts the tribune because a majority of a party majority has agreed to vote for him But such a majority easily may fall short of being a majority of the entire House Similarly, if polled individually, the bulk of the House membership might be found to prefer quite a different grouping, and quite different chairmen, in the great committees By the same token, measures approved in caucus and voted on the floor because members of the majority party, even though really opposed to them, feel obligated either by caucus actions or by other pressures to give them their support, may become law with the actual approval of what is numerically only a House minority In other words, legislation tends to be only in form by House majority, in reality, it often is by mere *majority-caucus* majority

Government by majority is, however, a tricky concept. We fondly suppose that we have it in this country, and at times we actually do so Congressmen

and senators, nevertheless, often are elected by mere pluralities, 10 of our presidents have had only a minority of the popular vote behind them, and decisions in Congress by something less than absolute majorities are merely part of an order of things which may be faulty but is capable of being corrected only by procedures too drastic to stand much chance of being undertaken

## ORGANIZATION OF THE SENATE

*Officers the president*

Crossing over to the opposite end of the Capitol, one finds in the Senate both a formal organization and a superimposed array of party agencies broadly resembling those in the House, yet in some respects working differently To begin with the officers are much the same except that the 'president' of the Senate occupies a position decidedly unlike that of the speaker of the House Being by terms of the constitution the vice-president of the United States, he of course is not chosen by the body over which he presides, sometimes he does not even belong to the majority party As a moderator, he preserves decorum recognizes members, decides points of order, puts questions to a vote, and announces the results His power of recognition is, however, commonly exercised with less partisan motivation than in the House, and not only are his decisions on points of order subject to appeal to the Senate, but especially difficult questions are likely to be put up to the members present before being ruled on by the presiding officer at all As a non member, he never participates in debate, and he votes only when necessary to break a tie Unless a man of unusual force, which he rarely has been, and also of high standing in the councils of the dominant party, the figure ensconced in the Senate chair seldom seeks to exercise any sort of leadership or to influence the course of legislative or other action [13]

*Committees*

Needless to say, there are committees—special committees, joint committees, and 15 standing committees—although use of committee of the whole was discontinued in 1930 except (unless decided otherwise) in considering treaties Formerly the number of standing committees (33) was relatively as excessive as in the House, and with the same disadvantages The Legislative Reorganization Act of 1946, however, reduced it by more than half, and the list today is as follows

- Agriculture and Forestry
- Appropriations
- Armed Services
- Banking and Currency
- District of Columbia
- Expenditures in the Executive Departments
- Finance
- Foreign Relations
- Interior and Insular Affairs
- Interstate and Foreign Commerce
- Judiciary
- Labor and Public Welfare
- Post Office and Civil Service
- Public Works
- Rules and Administration

Nearly all represent survivals, with in some instances considerably broadended functions, from the committee roster existing before the reorganization,

[13] The constitution requires the Senate to choose a president *pro tempore* to preside when the vice president is absent or when (as from 1945 to 1949) there is none The president *pro tem* always is selected from among the senators and as a member, may participate more actively in Senate business than a vice president

and in contrast with the former situation, in which committees contained anywhere from three to 25 members, all (except appropriations, with 21) now have 13 Much reshuffling was required when the new plan went into operation, but, once the scheme was instituted, it again became true as before, that, like the Senate itself, senatorial standing committees never die, new members being infused into them biennially, but with the bulk of the membership always carrying over from the preceding Congress Committee posts are divided between the two major parties in about the same proportion as in the House,[14] and, whereas formerly it was not unusual for a senator to serve on as many as five, or even more, committees he now may serve on no more than two[15]

How committees are reconstructed

At the opening of a new Congress, no full new committee slates have to be prepared and adopted by caucuses as in the House Instead the majority steering committee (subject to confirmation by Senate vote) decrees the allotment to be made as between the parties, a committee on committees of each party (in Democratic usage actually the steering committee) revises the party list for each committee, the majority group also designating chairmen in so far as changes are required or desired and in general accordance with the seniority principle, and the Senate elects, usually on first ballot and without discussion or delay

Party organization

The Senate is, of course hardly less responsive to considerations of party than is the House, and special party instrumentalities—"conferences" (in lieu of caucuses), steering committees, whips—are hardly less in evidence[16] Like the machinery known to the rules these extralegal agencies work, however, under limitations imposed by the differing nature and traditions of the smaller body The House is a highly integrated mechanism, with power concentrated in few hands Perhaps its numbers and its susceptibility to waves of emotion or passion require it to be so The Senate is a relatively small assemblage of older and more experienced men with more marked individuality, more respect for tradition, and still less willingness to be herded and controlled The presiding officer is of course, in no position to dominate The committee on rules—now "rules and administration —is but a pale image of the rules committee of the House Although choosing leaders and whips, and occasionally deciding upon a concerted course of action, a party conference usually is an occasion for only informal discussion, insurgents or irregulars often refuse to go into conference at all In short senators insist upon maintaining their own individuality and upon delegating control to no committee or other agency Proceedings are leisurely, debate is most of the time practically unrestricted, coercive force is virtually unknown

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## CHAPTER 15

# The Functions and Powers of Congress

We shall need to look more closely into the workings of the congressional organization described, including the relations between Congress and other branches of the government. Before doing this, however, it will be useful to get an over all picture of the functions falling to one house or both to perform. Congress, of course, is commonly thought of as our national lawmaking authority, and such, indeed, it is.[1] But enacting legislation is only one of its many tasks, and not always the one making heaviest demands upon its time and energy. No fewer, in fact, than seven principal forms of activity occupy one house or both from time to time: (1) constituent, *i.e.*, having to do with constitutional revision, (2) electoral, (3) executive, (4) judicial, (5) directive and supervisory, (6) investigative, and (7) legislative—an enumeration which of itself is sufficient to indicate that, although established with a view to separation of powers, Congress, like the presidency, deviates from that principle widely and often in its actual functions and workings.

### NON-LEGISLATIVE FUNCTIONS

*1. Constituent*

Some of the functions enumerated are dealt with fully enough at other points in this book, and are mentioned here only in order that the total scope of congressional activities be not lost to view. When considering the methods of amending the national constitution, we saw that, while Congress cannot under any circumstances independently make a change in the fundamental written law, not a syllable of that document can be altered without congressional action in some form. When viewing the mode of electing the president and vice-president, we saw that Congress acts as a board to canvass the electoral vote and declare the results, also that, in the event of failure of an electoral majority, the House of Representatives chooses the president and the Senate the vice-president. When presently discussing the executive functions of appointment and treaty-making, we shall observe how they are shared by the president with the Senate.

*2. Electoral*

*3. Executive*

The remaining four major functions enumerated, *i.e.*, judicial, directive and supervisory, investigative, and legislative, call for some attention here.

[1] Not, however, our *only* such authority, notwithstanding what Art. I, § 1, of the constitution seems to say. See p. 232 below.

4 Judicial

The constitution endowed the president and Senate with broad powers of appointment, and in practice a general power of removal soon developed in the hands of the president and of appointing officers responsible to him But how could an unfit official be ousted if the appointing officer failed to act? How could the president himself, in case of abuse of power or other official delinquency, be turned out of office before the end of his elective term?

Impeachment

The answer lay within easy reach in the historic device of impeachment, and with little division of opinion, the constitution's makers wrote into the document the well known provision that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for and conviction of, treason, bribery, or other high crimes and misdemeanors [2] Two features of this clause are especially to be observed First, only civil officers are subject to impeachment military and naval officers are liable to trial by court-martial, but cannot be impeached, and members of the legislative branch, although "civil," are construed not to be "officers" in the meaning of the impeachment provision Second, the grounds on which impeachment proceedings (more or less equivalent to indictment by grand jury) may be brought are specified—as definitely perhaps, as is feasible Bribery is self-explanatory, and treason is defined in the constitution "High crimes and misdemeanors" is a flexible phrase, but commonly interpreted to include only grave offenses involving something more than mere partisanship, incompetence, or private misconduct

Procedures and penalties

The process of impeachment starts in the House of Representatives, where, upon charges being preferred against a given official, a committee is appointed to investigate The committee reports to the House, and if, after duly considering the findings the majority so votes, the charges, in the form of "articles of impeachment,' are sent to the Senate (which has no option but to hear the case), the House at the same time naming a committee of "managers" to conduct the trial The Senate furnishes the accused with a copy of the charges against him, fixes a date for the trial to begin, and when the time arrives converts itself into a court under the chairmanship of its regular presiding officer, unless the president of the United States is on trial, in which case—because the vice-president would have a personal interest in the outcome—the chair is occupied by the chief justice of the United States The accused is allowed counsel, and may appear and give testimony in person, and witnesses for and against him are brought in and questioned At the close of the proceedings, which may last through many weeks, the galleries are cleared and the Senate votes A two-thirds vote is necessary to convict, anything less results in acquittal The penalty in case of conviction is removal from office, to which may be added disqualification for ever in future holding "any office of honor, trust, or profit under the United States , and the president's power of pardon and reprieve does not apply Once retired to private life, furthermore, the convicted person, if he has committed an indictable offense, may be tried and convicted in the ordinary courts like any other offender In the entire

[2] Art II § 4 Provisions for the impeachment of state officers likewise found their way into nearly all state constitutions

history of the country, impeachment proceedings have been brought against only 12 federal officers, and only four (all judges) have been convicted, although President Johnson, in 1868, escaped by only a single vote

5 Directive and supervisory

Another congressional function is that of directing and supervising administration More immediately, of course, this responsibility rests with the president and his principal subordinates But Congress authorizes or directly creates administrative and regulatory agencies and services, specifies how they shall be organized, defines their powers and functions, prescribes many of their procedures, fixes standards for them to observe, and provides the money for carrying on their activities, and all this opens a way for watchfulness over the work performed, for requests for information and reports for assignment of tasks and duties, and also of course for curtailment of activities, or even termination of them altogether (perchance of the agency itself), by denial of funds In concerning themselves with matters such as these, the two houses ordinarily are not legislating but simply supervising the operations of the government, somewhat as a board of directors supervises and guides the operations of a great business establishment, and the Legislative Reorganization Act of 1946 stressed the importance of the function by charging all House and Senate standing committees with continuous vigilance over the execution of any and all laws falling within their respective provinces Full performance of this responsibility would, however call for more time and equipment than are at Congress' disposal, and observers agree that the provision cited is one of the points at which the new law has been least effective

6 Investigative (a) Need

Obviously implied in the functions just mentioned is that also of investigation Under a cabinet system like the English, the heads of departments and other ministers sit in the legislature and are at almost all times available for questioning With us, legislature (in this context Congress) and administration are far more separate, and while much information is forthcoming through the normal channels of reports and of questions put to administrative officials appearing before congressional committees, there remain gaps which frequently can be filled only by special and extensive investigations carried on by standing committees, subcommittees thereof or special committees set up for the purpose [3] A proper function of a legislative assembly representing the people is to watch and control the government which they support and to throw the light of publicity upon its methods, policies, and acts, and under our system, legislative investigations become a major, even though sometimes cumbersome and expensive, technique for holding the executive and administrative agencies accountable

(b) Kinds

Regular or special committees are employed, however, not merely to probe into the workings of administration Of the more than 550 investigations, in all, undertaken at one time or another since 1789, many—especially in later years—have had to do with lobbying, expenditures in campaigns, immigration, industrial relations, the manufacture and sale of munitions, the operation

[3] The legislation of 1946 undertook to keep investigations so far as possible in the hands of regular standing committees or their subcommittees and in later years less use has been made of special committees than formerly

of stock exchanges, conservation, small business, and in the past two or three years, crime (investigated by a Senate committee headed by Estes Kefauver), tax frauds (investigated by a subcommittee of the House Ways and Means committee), and "peddling" of influence with administrative officials (investigated by a Senate committee) Most spectacular and voluminous of all investigations of recent years was that carried on jointly early in 1951 by the Senate committees on foreign relations and armed services into the president's dismissal of General of the Army Douglas MacArthur—an inquiry eliciting upwards of 800,000 words of testimony filling four published volumes

(c) Committees employed

In early times, most investigating committees were House committees, in later years, the larger proportion have been Senate committees, some two dozen, *e g* the Joint Committee on the Organization of Congress of 1944-45,[4] have been joint committees, and several notable ones, *e g*, the Temporary National Economic Committee of 1938, and more recently the [Hoover] Commission on Organization of the Executive Branch of the Government of 1947 49,[5] have included not only representatives of both branches of Congress, but members (usually appointed by the president) representing the executive branch and even the general public Investigations may, of course, be animated by personal or partisan motives As a rule, however, they are conducted on a loftier plane Many are honestly aimed at bringing to light the full facts about some government activity or some national problem or experience, many, at securing information for the intelligent drafting of laws, at shaping general governmental policy, or even at molding public opinion Some prove futile, some, prejudiced and abusive, but many lead to important remedial actions [5a]

(d) The problem of obtaining information

Persons from whom information or testimony is sought are not always disposed to cooperate Gradually, however,—and with full backing from the courts—Congress has gathered authority to employ compulsion, so that nowadays any duly constituted congressional committee has power not only to subpœna witnesses and administer oaths, but to require submission of books, papers, correspondence, contracts, and records deemed relevant to an inquiry, and, if necessary, to invoke judicial aid in securing them [6] At all events, this is true so long as information is sought from private, rather than official, persons or agencies But what if a committee wants testimony or papers from a department head, a bureau, the F B I, perchance the president himself, and *there is unwillingness to comply? This raises* an issue provocative of much controversy and even yet not entirely settled On the one hand, there can be no doubt about the constitutional right of either branch of Congress, or of a committee thereof, to inform itself on any matters falling within its legislative competence On the other hand, there are precedents reaching back to Wash-

[4] See p 270 below
[5] See p 315 below
[5a] At this writing the irregularities in tax collections revealed by the investigations of a ... dismissal

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ington's day for regarding the president as entitled not only to refuse to open his personal files for congressional inspection, but also to throw the cloak of his own immunity around any department, bureau, agency, or officer within the executive branch, and historical indications are that even if the courts are invoked, they too will be found lacking in power to compel compliance.[7] The ground for refusal commonly is that compliance would not be "in the public interest."

## THE LEGISLATIVE FUNCTION—BASIS AND SCOPE

*A primary function, but not unlimited*

But, after all, Congress is primarily a legislature, and from here on, in this chapter and the succeeding one, it will be considered in that aspect. To it, indeed, the constitution assigns "all legislative power herein granted." Two or three things, however, are to be observed at the outset. The first is the significant qualifying effect of the last two words, "herein granted." As has been emphasized so many times, our national government is a government of limited, enumerated powers, and the principle holds for Congress no less than for every other part of the establishment. Not only do the House and Senate have no power not expressly delegated or reasonably implied in some express delegation,[8] but the section of the constitution (Art. I, § 8) conferring a lengthy list of powers is balanced off with a section immediately following in which numerous powers are just as definitely withheld—in addition to which many prohibitions are laid down in the earlier amendments and at other points in the document.

Fundamental, indeed, to our system is the fact that Congress has not full and unrestricted legislative power, like the British Parliament, but only the legislative power *herein granted*. In other words, every exercise of legislative power by Congress must be based upon some authorization in the constitution. When, therefore, legislation is proposed or demanded, its advocates must be able to point to some clause (or clauses) of the constitution which, either expressly or by fair implication, grants the necessary authority. If, on their part, opponents can show that constitutional sanction is lacking, or at least can point to Supreme Court decisions so indicating, it probably will be useless to enact the intended measure, for, once a test case is brought, the Supreme Court—the final judge of congressional powers—will almost certainly rule that Congress has exceeded its constitutional authority. This restricted scope of congressional power easily explains why debates on the constitutionality of

[7] By order of President Truman, F.B.I. files were not opened in 1948 on peremptory demand

proposed laws commonly have occupied so much time and attracted such wide attention in connection with congressional proceedings

In the second place, notwithstanding what seems to be the explicit assertion of the constitution, Congress does not actually possess *the whole* of such national legislative power as there is In a chapter soon to follow,* we shall see how the president, by equally explicit constitutional provision, shares in the work of lawmaking and indeed often takes a leading part in it. We have already seen too, how the courts, in their task of construing and applying the laws, often necessarily bend and amplify them, in effect adding to, and actually making laws We shall find, also that not only treaties and executive agreements but also rules and regulations laid down by the president, or even by heads of departments and other administrative officers or bodies, are in effect laws and are treated by the courts as such if made in pursuance of authority validly conferred by Congress

Express grants

The situation, in a nutshell, regarding the scope of congressional legislative power is that (a) such power is defined positively by numerous express grants, (b) it is defined negatively by almost equally numerous express prohibitions, and (c) between these two fields lies a broad twilight zone of implied and resulting powers Upon many matters there can be no question as to general congressional power, because power has been conferred in definite and unmistakable terms As examples, one has only to recall the long list of subjects already referred to as enumerated chiefly in the eighth section of Article I, including taxation, borrowing, currency, patents, copyrights, bankruptcy, postal service naturalization, the regulation of foreign and interstate commerce, the maintenance of an army and navy, and declaring war Express grants hardly go farther, however, than to make it clear that Congress has authority over the specific subjects enumerated, a swarm of questions commonly will arise as to how a given power is to be exercised, what are its limits, and the like And when one encounters a grant of such obviously indefinite scope as that of providing for the "general welfare" of the United States, he will not be surprised to find different interpretations producing wide rifts among our best authorities on constitutional law Express grants are a great help in determining what the powers of Congress, and of the government in general, are, but they also become points of departure for argument and conflict

Permissive and mandatory powers

Most of the powers expressly conferred are permissive, that is to say, the two houses are constitutionally free to exercise them or not, in whole or in part —however necessary in practical fact it may be to make use of certain of them, *e g*, that of taxation Some grants, however, are mandatory For example, it is made the duty of Congress to call a convention of the states to amend the constitution whenever the legislatures of two thirds of the number so request, likewise to provide for taking the census every 10 years, to reapportion seats in the House of Representatives after each census, and to make regulations for carrying appeals from the lower courts to the Supreme Court In no instance of the kind, however, is there any way in which Congress can be

* Chap 18 below

compelled to act if it ignores the constitutional mandate, as when, for example, it failed to reapportion the House of Representatives after the census of 1920[10] The courts will not intervene, for they would have no means of compulsion The sole remedy lies with the electorate, and consists in choosing congressional majorities disposed to observe the constitution's specific requirements

**Implied powers**

Where there are express grants or express restrictions, the authority of Congress to legislate, or its lack of power to do so, is usually sufficiently clear On many subjects, however, the authority, if possessed at all must be derived by inference from some of the powers granted in express terms That legislative power may legitimately be derived in this manner, the constitution itself virtually asserts in the "implied powers" clause, which gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly vested by the constitution in Congress or in any other branch of the government[11] Likewise five of the last nine amendments expressly state that Congress shall have power to enforce them by "appropriate legislation " Sharp differences of opinion over what measures may, and what ones may not, fairly be deemed necessary and proper," or "appropriate," for carrying into effect the enumerated powers of the national government have made the powers of Congress 'the great battleground of the constitution " The Supreme Court however, early adopted a liberal interpretation of the clauses involved, to the general effect that if it can be shown that Congress has been given authority to deal with any specific subject, in exercising that authority the two houses are free to select any means or instrumentalities whatsoever which are not prohibited by the constitution are appropriate, and are consistent with the spirit as well as the letter of that instrument[12] Furthermore, whether a given law is necessary," within the meaning of the constitution, is a "political' question for Congress alone to answer, the courts will not rule upon it

***Resulting* powers**

The scope of congressional authority has been considerably widened, too, by decisions of the Supreme Court to the effect that it is not necessary for Congress to trace back every one of its powers to some single grant of authority, direct or implied, but that such authority may be deduced from a number of the specified powers taken collectively, or from all of them combined[13] Powers derived in this way are commonly called ' resulting powers " The criminal code of the United States affords a good illustration The constitution gives the national government express power to punish only five kinds of crime Congress, however, unquestionably has power to provide for punishing the violation of any national law and for protecting the constitutional rights of persons under accusation, even though such authority is neither expressly granted nor inferable from any single express grant in the constitution

[10] In this case Congress itself eventually introduced a safeguard for the future by providing a method of reapportionment which, so far as Congress is concerned can operate automatically (see p 196 above) But there never was a reapportionment under the 1920 census

[11] Art I § 8 cl 18

[12] This was the purport and in part the language of Chief Justice Marshall s classic statement in McCulloch v Maryland (1819) See pp 54 66 above

[13] Cohens v Virginia 6 Wheaton 264 (1821)

So-called emergency powers

When enacting a good deal of the legislation aimed at overcoming the depression of the thirties, and also legislation during the two world wars, Congress often was spoken of as making use of its "emergency powers", and the impression thus was conveyed that the constitution confers some special class of powers designed to be invoked by Congress only in time of great national stress. The fact is, however, that Congress has no power or group of powers labeled "emergency powers." There has, of course, been more than one great national emergency in our history, and the existence of such has been recognized officially by both president and Congress, as also by the courts. Nor can there be any denying that in times of economic or international crisis Congress has enacted laws which it never would have passed under ordinary circumstances. Nevertheless, as the Supreme Court has definitely said, "emergency does not create power, nor does it increase power already granted in the constitution, nor does it diminish the restrictions imposed upon the exercise of power."[14] At most, an emergency may merely prompt new uses of powers already employed, or bring into operation latent powers never before or only rarely, invoked. The constitutional basis for what are popularly called emergency powers must, therefore, be sought among the clearly granted powers (with, of course, their implications), and it is to be found chiefly in the power to regulate foreign and interstate commerce and the currency, in the power to tax, to borrow, and to appropriate money, and in the power to provide for the national defense. In stimulating national recovery after 1932, and in promoting national defense after 1940, Congress invoked and applied these basic powers in many novel ways, creating a popular illusion—but only an illusion—that some special reservoir of "emergency powers" had been tapped.

Exclusive and concurrent powers

The mere fact that Congress has been invested with authority to legislate on a given subject does not necessarily mean that the states have no right to legislate on the same subject. Naturally, in all instances where a power has been expressly prohibited to the states, as for example, with respect to coining money and laying duties on imports, Congress alone may legislate, and in such instances its power is said to be exclusive. There are instances, too, in which, even without any express prohibition upon the states, a power by its very nature belongs exclusively (or almost so) to Congress, *e.g.*, the regulation of interstate and foreign commerce.[15] But in practically all matters which do not fall within the two categories indicated, Congress and the state legislatures are said to have concurrent power, so that acts of Congress and state statutes relating to the same subject may be in full force at the same time. Thus there may be both national and state control over congressional elections, and both Congress and the states may levy taxes on the same incomes.

The term "concurrent power" covers also certain powers which may be exercised by a state only until Congress exercises the same power. On bank

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ruptcy, for example, every state originally was at liberty to make its own laws, and such laws had full force and effect until Congress (in 1898) chose to exercise its own right to legislate on the subject Once Congress had acted, any "concurrent" state bankruptcy laws, even though not formally repealed, fell into a state of suspended animation

Delegation of legislative powers

One further aspect of congressional legislative power hinges upon an interesting question Must Congress exercise its legislative authority exclusively by its own direct action, or may it hand over phases of such authority to be exercised by the president, an executive department, a board or commission, or some other branch or agency of the government? The query is an old one, and the constitutionality of many a federal statute has depended upon the way in which the Supreme Court, at a given time, has answered it On the one hand, the constitution as we have seen vests in Congress "all legislative powers herein granted"—which might seem to set up a presumption against any right to "farm out," or delegate, any powers of the kind On the other hand, such delegation is nowhere prohibited, and the "sweeping" or "implied powers" clause, authorizing Congress to make all laws "necessary and proper for carrying into operation" powers vested in Congress or in any department or office of the government is capable of being construed to open a way for Congress to decide that the most effective use that it can make of some of its powers is to delegate the exercise of them to the president or, through him, to some regulative or administrative agency The latter is the view that has commonly prevailed, and the Supreme Court has sustained many delegations of the kind

Illustrations

When, 60 years ago, it was proposed to vest in an expert independent commission the regulation of railway freight and passenger rates in interstate commerce, it was objected that this would be an unconstitutional delegation of legislative power Nevertheless, Congress, convinced of the impossibility of dealing satisfactorily with such complicated matters by direct and detailed legislation, passed the Interstate Commerce Act of 1887, simply prescribing that all rates and services should be "fair and reasonable," and then delegating to the new Interstate Commerce Commission the duty of determining the fairness and reasonableness of rates in specific cases [16] For similar reasons, powers of like scope have been conferred upon the Federal Trade Commission, the Federal Communications Commission, the Federal Power Commission, and numerous other regulative bodies The president, too, has been the direct beneficiary of many such delegations, as when, in 1934 (with several later renewals), he was given authority to conclude trade agreements with foreign states altering tariff rates by as much as 50 per cent, thereby operating in a field, *i e*, tariff-making, traditionally regarded as of a legislative nature Numerous, too, as such delegations are in ordinary peacetime, they become vastly more imposing in time of war, when to the president's inherent authority as chief executive and commander-in-chief must invariably be added many and great powers essential to unified and effective direction of the war effort—powers, furthermore, which Congress alone is competent to confer.

[16] See pp 395 398 below

During World Wars I and II, Presidents Wilson and Roosevelt, respectively, attained their lofty pinnacles of authority largely by virtue of powers bestowed (usually for limited periods, but sometimes renewed) by Congress

Limitations

In upholding such delegations, however, the Supreme Court has insisted upon a restrictive and significant distinction powers, it has said, which involve merely making detailed applications of law (in other words, decisions and acts properly to be regarded as administrative) may be delegated, powers involving the determination of general policy (in other words, true acts of legislation) may not [17] The essential function of legislation is to lay down the rules, fix the standards and specify the conditions by which those in charge of administration shall be guided, and these things Congress alone is constitutionally competent to do But after Congress has prescribed the general framework of regulations within which railroad rates, for example, shall be determined it is proper enough (and indeed quite necessary) for it to pass on to a more specialized agency (in this case the Interstate Commerce Commission) the task of fixing or approving the precise rate on a ton of steel shipped from Pittsburgh to New York—although, of course, any power so delegated can be restricted or even withdrawn at any time It was this distinction between delegation of basic legislative authority and delegation of supplementary regulatory authority—or rather the failure to recognize the distinction—that brought to grief much of the legislation associated with the earlier stages of the New Deal Various "recovery' laws of 1933-34 (notably the National Industrial Recovery Act and the Agricultural Adjustment Act of 1933) undertook to confer upon the executive a sort of "roving commission" to make laws in the form of codes and regulations for industry, trade, and agriculture, but in so doing, failed to set up definite standards, or "yard sticks," to govern in exercising the powers bestowed As a result, the Supreme Court, in case after case, overthrew the legislation, [18] and while the Court, as constituted today, undoubtedly would view similar measures somewhat more tolerantly, the principle still holds that a congressional delegation of power, to be sustained, must go no farther than to confer discretion in administering laws which themselves cover the essentially *legislative* aspects of the subjects with which they deal—even though the term 'legislative" is likely to be construed less narrowly than it used to be

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[17] It shc [illegible] s as by authorizing [illegible] horizing them to m [illegible] *advisory* referendum [illegible] ver has been employed

[18] See pp 426 455 below

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## CHAPTER 16

# Congress at Work—The Legislative Process

General aspects of congressional business

Although each branch of Congress has certain tasks which the other does not share, the two alike spend most of their time considering (1) bills, which become effective by being passed in the same form at both ends of the Capitol and approved by the president, (2) joint resolutions, sometimes narrower in scope and more temporary in purpose, but otherwise similar to bills, and becoming effective under the same conditions, (3) concurrent resolutions, employed to express an attitude, opinion, intention, or objective shared by the two houses, but not "enacting" anything or having any legal effect, and not submitted to the president, and (4) simple House or Senate resolutions, declaring an opinion, purpose, or intention of one house alone, and of course also not submitted to the president Some of the measures which the two bodies handle are designed to make or declare new law, others, merely to amend, clarify, or consolidate existing law, many do not make or modify law at all in any proper sense, but merely appropriate money, define duties, regulate procedures, give directions, or even, as indicated, simply express attitudes or opinions Speaking broadly, however, whenever anything is *enacted,* the same machinery is (or may be) employed, and likewise the same general procedures, however frequently the "regular order" may be, and is, deviated from by both houses in particular situations Accordingly, a reasonably adequate understanding of how Congress performs its primary function will be obtained if we briefly trace the steps normally taken between the time when a legislative proposal is put into the form of a bill or joint resolution and the final publication of the measure as a completed statute (See also the frontispiece for a graphic picture of the path of a bill through Congress )

Rules of procedure

A preliminary word is necessary, however, concerning rules Both houses started off in 1789 with regulations taken over largely from the Congress of the Confederation, which in turn borrowed from the colonial legislatures and, through them, ultimately from the English House of Commons of the eighteenth century and earlier, and since that time both have developed codes of remarkable scope and complexity With existence continuous, the Senate carries along its rules from session to session with only occasional changes Expiring every two years, House rules, however, must be readopted in full biennially, with changes (if any) usually made when readoptions are voted Originally few and easily learned, House rules now number 43, fill (with copious annotation) upwards of 200 pages of print, and form "perhaps the

most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body in the world'—a code so elaborate that few members ever succeed in mastering it completely Senate rules are fewer (40), simpler, and more easily grasped The sources of House rules, as they stand today, may be summarized as (1) the eighteenth-century heritage of regulations and practices, as modified and adapted through later generations, (2) the federal constitution, in so far as a few of its provisions are pertinent, (3) the *Manual of Parliamentary Practice* prepared by Thomas Jefferson for use of the Senate when he was its presiding officer, and adopted *en bloc* by the House in 1937 to govern in all cases where applicable and not inconsistent with the standing rules and orders', and (4) decisions of successive speakers and chairmen of the committee of the whole—decisions standing in much the same relation to the formal rules that, in a different sphere, court decisions bear to statutes [1]

## INTRODUCTION, AUTHORSHIP, AND NUMBER OF BILLS

*How bills are introduced*

Nothing is easier than to give a bill its start *i e* to 'introduce" it Whether a measure be 'public," *i e* of general application, or 'special (or "private"), *i e*, applying only to particular persons objects or places all that is required is that a copy of it, endorsed with the name of the member introducing it, be dropped into a box ("the hopper") on the clerk's (in the Senate, the secretary's) desk Any bill may make its first appearance in either house, except only that bills for raising revenue are required by the constitution to 'originate" in the House of Representatives Indeed, through its right to amend revenue bills, even to the extent of substituting new ones, the Senate may, in effect, originate them also Once introduced, a bill continues 'alive" throughout the duration of the existing Congress or until sooner disposed of, in a succeeding Congress, however, it can get on a calendar only by being reintroduced

*Authorship*

Nothing would be farther from the truth, however, than to suppose that some member of the House or Senate is the actual author of every measure presented Congress, we are assured by a former member of long experience and high standing, is "not to any material extent an originating body" [2] In the first place, approximately half of all major public bills emanate—frequently in full drafted form—from the executive branch of the government, *i e*, from the White House or from one of the executive departments or independent establishments Contrary to the situation in countries having a cabinet system of government, no member of the executive branch, it is true, can directly

is placed in the hands of the appropriate standing committee and introduced through it, normally by the chairman, and sometimes simultaneously in both houses

In the second place, bills originate with, or at least are inspired by, persons, groups, or organizations (labor, veteran, and the like) entirely outside of government circles, and usually these are presented by members individually Here we come upon a main reason for the flood of bills that descends upon Congress at every session Senators and congressmen themselves, sometimes sharing the great American illusion that the way to cure any ill is to "pass a law," originate a certain number But to a far greater extent they are merely the purveyors of proposals from the outside Judging it worth while to please those with interests or "causes," and at the same time to have their own names in the newspapers (in their home districts, at all events) as the authors of bills, senators to some extent, but especially representatives, usually are willing to introduce any number of measures, however ill considered and fantastic, at the request of persistent lobbyists or constituents with "a grievance, an ambition or a hope" They need not personally favor, or even fully understand, everything they introduce, hundreds of bills every session bear "by request" labels, often enough indicating that the members formally presenting them disclaim any personal responsibility for their contents But not a whit less on that account, such bills inundate the clerk's desk and help clutter up the calendars [3]

Multiplicity

Although materially reduced since the Legislative Reorganization Act of 1946 sharply restricted the introduction of private bills,[4] the number of bills and resolutions making their appearance in one house or the other in every session is still large Formerly, the total for a Congress was likely to run as high as 12,000 to 15 000, nowadays the figure commonly is within the range of 10,000 to 12,000—about two thirds of the number ordinarily being introduced first in the House and the remainder in the Senate [5] Of the yearly grist, the best that one can say is that only a few measures present possibilities of wise legislation, fewer still receive attention, and fortunately still fewer ever pass [6]

[3] Administration bills are almost invariably drafted by experts in the departments (with

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lly high) of

## COMMITTEE STAGE IN THE HOUSE OF REPRESENTATIVES [7]

*Reference to committee*

All bills introduced are given a serial number (becoming, for example, H R 144 or S 177), printed, and referred to one or another of the standing committees [8] Such private bills as still may be presented are turned over automatically to the committee suggested in each case by the sponsor of the bill as the appropriate one for handling it, public bills are sorted out and assigned according to the subjects with which they deal nominally by the speaker, actually as a rule by his assistant and adviser, the parliamentarian Sometimes however, a bill is of such a nature that it might be referred with almost equal propriety to any one of two or more committees, and in this event, as indeed in all cases of doubt, and also in the case of all bills received from the Senate, the speaker is likely to decide personally what shall be done The fate of proposed legislation may be determined at this very first stage by the bill being referred to a committee likely to be well disposed, or, on the other hand, to one likely to be hostile, and a speaker faced with assigning an especially controversial measure may find himself virtually wielding the power of life or death Occasionally, but not often a bill is transferred from one committee to another by majority House vote—usually to ease its passage

*Committees at work*

Each standing committee now has a commodious room in the Capitol or in one of the office buildings with books, pamphlets records, and whatever stenographic service is needed, and there it holds meetings as required, using forenoons for the purpose in order to avoid conflict with sittings of the House (starting regularly at noon)

Even with minor committees now eliminated, some have relatively light loads Others, however, receive scores, and even hundreds, of bills every session, or have unusually long and complicated measures to handle (perchance, as in the case of finance bills to write) and accordingly find themselves crowded for time To expedite matters these create subcommittees (usually of five members) to which particular measures or classes of measures are assigned or even individual sections of the same measure if it be one of exceptional complexity and importance At all events, it is in the committees, and more or less behind the scenes that much of the actual record of a Congress—especially in the House of Representatives—is written 'Congress in its committee rooms," declared Woodrow Wilson, "is Congress at work " [9]

*Sources of information*

On receiving a bill, a committee has first to inform itself on the measure's nature and contents, and then to decide what to do with it For the great majority of bills, this means nothing more than a cursory glance, revealing that the proposal has little or no merit (or at any rate no present interest for the committee), and summarily condemning it to a lingering death in the

[7] To avoid repetition the legislative process will here be outlined for the House only with

created free and equal
egun, however the vast

committee files A bill here and there, however, will be recognized as having claim to attention, and if time permits, it probably will receive consideration In the case of such a measure, the first requisite is information from which to judge whether legislation on the subject is needed, whether the bill in hand is calculated to meet the need, and what results and implications would follow if it were passed The committee—at least some of its more experienced members—may already know a good deal about the subject But usually more will have to be learned And the needed information is, or may be, obtained in a variety of ways Availing themselves of the resources of the committee library of the Library of Congress (including the Legislative Reference Service), and of official files, committee members may study the proposal at first hand and come to a conclusion on what action to take Specified portions of the measure (or even the whole of it) may be assigned to subcommittees for more intensive study Under the reorganization legislation of 1946, furthermore, all committees are entitled to the regular services of as many as four persons qualified to assist in carrying on research Either by request or on their own initiative, interested officials, too, may appear in person to give testimony and present argument, heads of departments, indeed, have been doing this increasingly in later years And of course, lobbyists usually can be depended upon to volunteer information or materials, however biased

Public hearings

Finally if a bill deals with a highly controversial subject, or will seriously affect large numbers of people, the committee having it in charge almost certainly will hold public hearings on it That is to say, arrangements will be made for interested individuals or spokesmen of organizations having something at stake, or presumed to be in possession of useful information, to appear before the full committee or more likely a subcommittee designated for the purpose and give testimony while the members listen and perhaps draw them out with questions Certain persons commonly are invited to appear, but opportunity will usually be offered others who desire to do so, including paid attorneys engaged to support or oppose the measure or particular provisions of it Both House and Senate use the device freely, as also do most of the state legislatures, and although briefly experimented with in one or two European countries, it may be looked upon as a characteristic feature of the American legislative process

Possible forms of committee action

Notwithstanding more or less publicity in the earlier stages of its deliberations, a committee eventually goes into executive session on a bill and reaches its conclusions in private [10] Any one of several results may follow It may report the bill unchanged, which, of course, is tantamount to recommending its passage Or it may strike out some sections, add others, or alter the phraseology, and report the measure in this amended form Or it may rewrite the bill completely—in effect, frame one of its own—and present the result

[10] In the executive sessions of committees writes an experienced former member already quoted falls the mo [illegible]

[illegible]

as a substitute In all of these cases, the report is likely, although by no means certain, to lead to favorable action by the House especially if the committee (or even the majority element, in instances where party lines are drawn sharply) has come to its decision by a unanimous vote—and provided, of course, that neither the rules committee (to which the report is in the first instance submitted) nor the speaker interposes obstruction The committee has, however, one other possible course it may make no report at all—in other words, 'pigeonhole the bill, and this is the fate that befalls three-quarters or more of all measures introduced The decision to make no report may come after, and as a result of, investigations and hearings, but in the great majority of instances it arises from agreement (tacit or otherwise) at the very beginning not to take up the bill at all [11]

*Forcing a committee to report*

The ease with which a committee can kill a bill by simply not reporting it always has been a sore point, and controversy on the subject has filled many pages in the annals of the House To be sure committees are only agents of the House, and as such are subject to orders and instructions, if the House desires to discharge a committee from the further custody of a bill—in other words, require it to report—it has full legal power to do so The matter is, however, less simple than it sounds because usually it is a minority, rather than a majority, that wants to get a bill out of a hostile or lethargic committee, and as the rules stand, there is no means by which anything less than a majority (218) can—and then only after a bill has been in a committee's hands as long as 30 days—force a vote on a discharge question In 1931, the House did adopt a rule under which as few as 145 members (one-third instead of one half) could force such a vote, but on the ground that this gave too much scope to pressure groups and compelled the House to call back bills which only a minority wanted to have considered the plan was abandoned in 1935 Consequently, it remains true that almost any measure can be killed in its initial stages by simple failure of the committee having it in charge to report Committees serve as instrumentalities of the House to investigate and reach conclusions, and the House expects normally to be guided by their recommendations If they refuse to recommend action that ordinarily is the end of the matter

Without, indeed, the rigorous sifting of bills in this way, the House would be hopelessly swamped, and it would become necessary to place severe restrictions upon the number of measures introduced Occasionally, a committee fails to report a meritorious bill for the simple reason that the majority members are personally or politically prejudiced against it But most measures that come to their end because of failure to report deserve no better fate [12]

[illegible] But this rarely is done if it cannot [illegible] session but the [illegible] from 1924 [illegible] procedure was [illegible] and the bill of [illegible]

## THE HANDLING OF BILLS AFTER COMMITTEE STAGE

Selection of bills for consideration

Having been returned to the clerk of the House, a reported bill is placed, in accordance with its nature, in one or another of three series, or lists, known as 'calendars' It must not be supposed, however, that bills are invariably called up from the calendars in the order in which they are listed—still less that all calendared bills are actually debated and voted on With nearly a score of standing committees reporting bills, the calendars grow congested, and the best that the House can do is to pick off a bill here and there for adoption by unanimous consent, or, in the case of more controversial ones, for report and debate making sure that the most essential ones like appropriation bills are included but letting the others take their chances No House rule, indeed is oftener set aside than that requiring bills to be taken up in their calendared order, and no prerogative of the majority steering committee transcends that of deciding when, and in behalf of what bills, the committee on rules shall bring in for adoption by majority vote a special order making a given bill the regular business of the House immediately or at a specified later hour Most important measures—and some not so important—are thus lifted out of their sequence on the lists and put in a preferred position, otherwise, they never would be reached Hundreds of measures "die on the calendars" in every Congress

Regular order of business not adhered to

There is, it is true, a daily order of business, duly prescribed in the rules But exceptions and suspensions often render it of little effect In the first place, fixed days are set aside for (1) certain classes of measures, *e g*, the first and third Mondays of each month for unopposed bills, the second and fourth Mondays for District of Columbia business, and for (2) measures called up under a special procedure known as "Calendar Wednesday," when standing committees having custody of various sorts of "unprivileged bills" may be given a chance to report On any day, after the previous day's journal has been read, it is in order to move that the House go into committee of the whole to consider revenue or appropriation bills Certain standing committees (in particular the rules committee) are privileged to report at virtually any time and to request immediate consideration of whatever is reported From the rules committee may come at almost any moment proposed orders which, if adopted, will turn proceedings in an entirely different direction Finally, on specified days, the House may, by two-thirds majority, suspend all rules and depart as widely as it likes from the regular procedure, even to the extent of passing a bill through all of its stages at a single vote, or at any rate on the same day

Committee of the whole

Mention has been made of the committee of the whole, and inasmuch as the sessions of this committee occupy the greater part of the time of the House, something more should be said about it Technically, there are two committees of the kind—a Committee of the Whole House for the consideration of private bills and a Committee of the Whole House on the State of the Union for considering public bills—both consisting of the same people, both merely the

House itself sitting in a different guise, and only the second any longer often employed. The mode of operation can be indicated briefly. A member moves that the House resolve itself into committee of the whole for the consideration of a designated bill, the motion is put and passed, the speaker yields the chair to a special chairman whom he designates, 100 members constitute a quorum, instead of the majority required when the House is in regular session, debate proceeds, very informally, under a rule allowing only five minutes to each speaker at a time, unless with unanimous consent, there are no time consuming roll-calls, divisions being taken only *viva voce*, by rising vote, or by tellers, with no record kept of how members vote, motions to refer or to postpone are not permitted, and when discussion is completed the committee votes to "rise," the speaker resumes the chair, the mace (the symbol of the speaker's authority) is restored to its place on a marble pedestal at the right of the chair, and the chairman of the committee reports the decisions reached. The House must, of course, act upon the committee's report in order to give it effect.

This very useful device enables all finance and most other important bills to be considered for amendment under circumstances such that ordinarily every member of the House who desires to do so can be heard. It permits large numbers of amendments to be presented, explained, and disposed of speedily. It facilitates rapid fire, critical debate which commonly shows the House at its best. And, for better or worse, the absence of recorded yeas and nays enables members to register their sentiments without check or restraint such as published votes sometimes impose.

*The three readings*

Except when disposed of under unanimous consent procedure, a bill or joint resolution can be adopted only after three readings. Of these, the first is by title only, speaking strictly, it no longer is a "reading" at all, for the requirement is deemed to be met by printing the title in the *Congressional Record* and the *Journal*. Then the measure goes to committee and, if reported back, is placed upon its calendar for a second reading. Second reading—which (provided it is ever reached) takes place in committee of the whole, or for bills not there considered, in the House itself—is an actual reading in full (unless dispensed with by unanimous consent or suspension of the rules), with opportunity for debate, and for amendments to be offered, whether aimed at strengthening the measure or at weakening it and perhaps achieving its defeat. And this is followed by a vote on the question, 'Shall the bill be engrossed [*i.e.*, reprinted as amended] and read a third time?' If this stage is passed successfully, the third reading takes place (by title only unless a member, probably to the disgust of his colleagues, demands a reading in full), with a vote then taken on final passage. If the result is favorable, the bill or resolution, duly signed by the speaker, is ready to be sent to the Senate, or, if that body has already enacted it in identical form, to the president.

*Closure*

Normally, debate takes place only on the question of ordering a bill to a third reading, although, if not cut off by the 'previous question' (explained below), it may be renewed on the question of final passage. When a measure reaches the stage at which it can be discussed on the floor, the chairman (or

other designated representative) of the committee reporting it speaks in its behalf, with a minority member following if, as usually is the case, the report has not been unanimous Other members of the committee speak alternately for and against the bill, and finally members of the House who do not belong to the committee are recognized (perhaps in accordance with lists placed in the hands of the speaker)—provided time remains And this matter of time presents problems A rule dating from 1841 forbids a member to speak longer than one hour, except with unanimous consent This alone, however, in so large a body would not keep debate within desirable bounds, and two additional devices are employed (1) advance agreements between the opposing floor leaders—frequently embodied in special orders brought in by the rules committee—fixing the length of time (in terms of days, hours, or even minutes) that discussion shall be permitted to run, and perhaps indicating how the time shall be allotted, and (2) a practice (mentioned above and borrowed in modified form from the English House of Commons) known as the "previous question" At any stage of discussion (except in committee of the whole), any member of the House may 'move the previous question", and if the motion carries, a quorum being present, debate is closed (with 40 minutes allowed if there has as yet been none), no more amendments can be offered, and a vote is taken on whatever is pending

Checks on obstruction

Formerly, opponents of bills under discussion employed all manner of expedients to kill time and prevent action Dilatory motions were offered, unnecessary roll calls were forced, efforts were made to stop proceedings by leaving the House without a quorum, confusing amendments were proposed, and as a result much time was wasted Rulings of vigorous speakers,[13] in some cases incorporated into the standing regulations, have curbed such tactics, although ways of slowing up business (chiefly demanding incessant time-consuming roll calls) still are within the reach of members disposed to employ them

Methods of voting

Upon conclusion of the consideration of a bill or resolution, or an amendment thereto a vote is taken In regular sittings of the House, four, and in the committee of the whole three, modes of voting are employed The first, and most common, is a test by simple sound of voices, *i e*, a *viva voce* vote If any member is dissatisfied with the announced result of this, he may demand a rising vote (technically a "division"), whereupon the supporters of each side of the question stand and are counted Again, if one-fifth of a quorum demands it, a vote is taken by tellers a teller is designated for each side, the two take their places in front of the speaker's desk, the members in favor of the measure pass between them and are counted, and then those opposed, and the result is declared by the tellers and announced by the chair Or, finally (in the House as such, though never in committee of the whole), if one fifth of those present demand it, the "yeas and nays" are ordered the clerk calls the names of the members, who respond with "aye" and "no", these individual

[13] Notably those of Speaker Reed in 1890 refusing to entertain motions regarded as dilatory and instructing the clerks to count as present all members observed to be within the chamber whether responding to roll calls or not

votes—sometimes different (since they are to be put permanently on record) from those previously cast *viva voce*—are recorded, and the result is duly announced The yeas and nays may be demanded before any one of the other methods has been employed, and, if ordered, are taken forthwith [14] Effort used to be made to compel all members present to vote, but this has been given up as impracticable

## PROCEDURE IN THE SENATE—FILIBUSTERING AND CLOSURE

After a bill has won its initial triumph in the House, the clerk certifies it and carries it to the Senate chamber, where procedure on it will be generally similar to that in the other branch Whether coming from the House or originating in the Senate itself, a measure is referred to one of the standing committees, if acted upon favorably it is reported, if reported it is placed on the single "calendar of business' which the Senate maintains,[15] from which it may be called up either in or out of its turn, three readings must be passed, the second one, at which amendments are offered, being usually the critical test, except that tellers are never employed, voting is as in the lower house, and in the end the bill may be adopted as it stands, or adopted with amendments, or rejected

Differences between Senate and House procedure

There are, nevertheless, some important differences between Senate and House methods of operation For one thing whereas the Senate formerly made more use of the committee of the whole than does the House, it abandoned the device altogether in 1930 save for considering treaties In the second place, with the exception that appropriation bills enjoy a certain priority, there is virtually no privileged business in the Senate, leaving the calendar to be followed automatically or with transposition of bills as desired More important still is the absence of any very effective arrangements for limiting debate There are no restrictions on the length of speeches, except such as occasionally are agreed upon in advance with respect to a particular measure, nor any upon their number, except that a senator may not, without leave, speak more than twice on the same question (twice more on amendments) in a single day, and—save for (1) occasional resort to a "unanimous consent' procedure (under which the members agree to a specified restriction of debate), and (2) the very infrequent use of a closure rule adopted in 1917 and amended in 1949—debate proceeds with less restraint than in any other important legislative body in the world The comparatively small number of members has made this possible, and it cannot be denied that such liberty has some genuine advantages The knowledge that ordinarily debate will not be cut off as long as any member, majority or minority, has something to say stimulates discussion and encourages the consideration of measures from all angles It operates, too, as a wholesome check, not only upon party autocracy, but sometimes upon tendencies to executive dictatorship as well At all events,

[14] With a roll-call consuming some 45 minutes, a great deal of time could be saved by use of an electrical recording device now employed in 21 state legislatures

[15] There is however, a special non legislative calendar for nominations and treaties.

the Senate has been adamant in refusing to adopt anything resembling the one-hour rule prevailing at the other end of the Capitol

**Obstruction in the Senate filibustering**

Unfortunately, liberty sometimes is abused In the Senate, the commonest form of such abuse is boresome garrulity—wasting time by sheer talkativeness as often as not on some subject entirely foreign to that supposed to be under discussion More exasperating however, is the practice of deliberately taking advantage of freedom of debate with a view, not to throwing light on the topic in hand or to converting the opposition, but to delaying and perhaps preventing action This procedure commonly termed filibustering, and taking many forms—dilatory motions demand for quorum roll calls, reading from books or articles and mere irrelevant *talking*—was by no means unknown in earlier times (there was an instance of it in 1789), but has been employed most spectacularly and effectively in the last 60 years, and especially since about 1910 A filibuster may be organized and conducted by a group or *bloc* of members working in carefully arranged relays, or it may be carried on by a member singlehandedly, and it may have as its object to defeat a measure by 'talking it to death,' to force some change of content or phraseology, or to compel the majority to agree to tack on some provision, or even to pass some other bill, perhaps quite unrelated, in which the filibusterers are interested At best valuable time is wasted in addition, useful measures sometimes are defeated and urgent appropriations held up

**The closure rule of 1917**

Back in 1917, following defeat by an eleven-man filibuster of a critically important measure for the arming of American merchant ships against the menace of German submarines, the Senate was indeed induced to adopt a regulation introducing a species of closure, and as a result there came to be a procedure as follows (1) *A motion to close debate on a given measure must* be signed by one sixth (*i e* 16) of the senators (2) On the second calendar day after the motion was filed, the roll of senators must be called on the question 'Is it the sense of the Senate that the debate shall be brought to a close?' (3) If two thirds of the senators present voted in the affirmative, the measure before the house became its 'unfinished business" until disposed of, to the exclusion of everything else And (4) thereafter no senator might speak for more than an hour in all on the measure itself, on amendments to it, or on motions relating thereto Furthermore, no amendments might be presented except by unanimous consent, no dilatory motions were permissible, and all points of order were decided by the chair without debate

**Rare use of the device**

This was closure in rather a mild form The specified two-day delay gave the opposition a chance to mobilize its forces, the required two-thirds vote was a high hurdle to surmount, and in the 32 years from 1917 to 1949 only 19 closure motions were voted on and only four (two of them during debates on the Versailles Treaty in 1919 and adherence to the World Court in 1926) received the necessary two thirds majority

**Filibusters continue**

Meanwhile, filibustering went on unchecked Prior to 1933, a favorite time to launch such an effort was the closing weeks or days of a 'short session," since all that was necessary to victory was to hold out until a fixed hour for adjournment (noon of March 4), and the Twentieth Amendment, putting

an end to short sessions, was expected to make filibusters rarer. One of the most notable filibusters of the time, however, occurred in the very first session after the amendment was proclaimed, and while, with short sessions continued there might have been still more, over a dozen of serious magnitude took place (both closure rule and constitutional amendment notwithstanding) during the ensuing 17 years.

The closure rule amended (1949)

The latest chapter in the story was written in 1949, when Southern senators rose almost *en masse* against a civil rights program vigorously urged by President Truman and (among other things) requiring fair employment practices, proscribing lynching, and forbidding poll tax requirements for voting in federal elections. With five different resolutions pending for strengthening the closure rule (two of them—warmly supported by the President—substituting simple majority for two thirds as the vote required for applying closure), a strong Southern *bloc* first filibustered successfully against items in the President's program and then engineered through the rules and administration committee and finally the Senate itself two compromise amendments to the closure rule of 1917, the first requiring the prescribed two thirds vote to be calculated, not as before simply on the number of senators present, but on the body's total membership,[16] and the second expressly exempting from closure any motion to consider a proposed change of existing Senate rules. With these modifications, the 1917 rule still stands. But manifestly the effect of both is to weaken it, and after their adoption the President's entire civil rights program, on which action had plainly become impossible, was for the time being shelved.

Some pros and cons

A set of rules permitting minorities, or even individuals, to frustrate the will of overwhelming majorities has often enough been ridiculed and denounced by observers of the congressional legislative process. On the other hand it is contended, by senators and others (1) that notwithstanding time consumed by filibusters, the Senate contrives to transact a very creditable amount of business—in five recent Congresses, for example, passing 182 more bills and resolutions than did the House, (2) that the present oft used device of 'unanimous consent,' by which the members agree in advance to limit speeches on a given measure after a certain day and to take a vote at a specified hour, serves all necessary purposes, being indeed itself a species of closure, (3) that most measures killed by filibusters are not favored by the country and are never revived (proposals in the Truman civil rights program afford exceptions), and (4) that the vigorous protests against filibustering sometimes voiced on the Senate floor come usually from members whose pet projects have suffered, but who, with circumstances reversed, would be perfectly ready to plan and launch filibusters of their own. It is perhaps utopian to suggest that the best solution for the problem would lie in an extension of "senatorial courtesy"[17] to include a decent respect for the right of one's colleagues to vote on a legislative proposal.

[16] That is, on 96 rather than on merely a quorum, i.e. 49. Previously closure could be ordered by a minimum of 33 senators but under the new plan never by fewer than 64.
[17] See p. 298 below.

## CONFERENCE COMMITTEES

Resolving differences between the houses

A bill which passes both branches of Congress in identical form is sent to the president and becomes law if it receives his signature or even under certain circumstances if it does not The Senate may, however, amend a House bill, and the House may amend a Senate bill, and unless the first body forthwith accepts all of the amendments added by the second, or the second recedes from its position (neither of which will often happen in the case of an important measure), some means must be found for overcoming the disagreement The device regularly employed to bring the houses into harmony is the appointment of "committees of conference", and statistics show that, on the average, from one-tenth to one twelfth of all bills and joint resolutions that Congress enacts—including almost all more important ones, *e g* on taxation, commerce, agriculture, labor relations, foreign assistance, etc —are referred to such mediating agencies

Conference committee procedure

A bill having been passed in two differing forms, either house may ask for a conference, and the request having been agreed to (very rarely is there a refusal), the presiding officer of each house names as a rule three or five, but occasionally, for very important bills, seven, or even nine, "managers" to represent it, including almost invariably in each case the chairman, the ranking majority member, and the ranking minority member of the committee having the bill in charge The two sets of managers then meet and discuss the points upon which there is disagreement, seeking by process of give and take to whip the bill into a form which both houses will accept[18] Sometimes the task is easy and is performed in a few hours, more often it is difficult and entails days, or even weeks, of hard work If in the end it proves impossible, the bill fails, unless other conference committees are appointed and have better luck As a rule, however, a consensus is arrived at and the reported bill is accepted or rejected by the houses (as indeed it is required to be) without further attempt at amendment Ordinarily, the house which has insisted on amendments recedes less from its position than the one which first passed the bill

Defects

As a device for oiling the machinery of legislation, committees of conference are indispensable Nevertheless, they have shortcomings Invariably they work behind closed doors, hold no hearings, and give their proceedings no publicity, and doubtless it would be difficult for them to make headway if they did otherwise Nevertheless, criticism often is voiced For while the committees are supposed to deal only with actual differences between the two houses and to stay well within the limits fixed by the positions which the two have taken, they often work into measures, as reported, provisions of their own devising, even going so far as to rewrite entire sections Log rolling enters in, and sometimes the compromises reached embody rather the worst than

[18] The numbers of "managers" from the two houses may differ but this does not matter since agreements are reached not by majority vote of the entire group, but by concurring majorities of the two sets of conferees acting separately

the best features of the two contending plans Conference committee reports, moreover, are likely to reach the houses near the close of a session, under the rules, they are highly privileged, and while either house may disapprove a report and call for another conference, there usually is a strong presumption in favor of adoption There may be little time for critical scrutiny or debate, and failure to act—especially if financial provisions are involved—might interfere with the operation of the government In practice, this often results in the enactment of important provisions, more or less surreptitiously added without consideration by either house—in other words, legislation nominally by Congress but actually by conference committee

## OTHER ASPECTS OF PROCEDURE

When a bill has been passed in identical form by both houses, it is "enrolled," *i e*, written or printed on parchment, and thereupon is signed by the presiding officers and sent to the president If he approves it or if it becomes law without his signature, it is transmitted to the General Services Administration to be deposited in the archives, and also to be published If it receives a "messaged" veto, it goes back to the house in which it originated and becomes law only if, upon reconsideration, it is passed in both houses by a two-thirds vote If it is pocket vetoed, it simply dies [19]

Publicity of proceedings

On the ground that part of its work *e g* considering treaties, was of such a nature as to require secrecy, the Senate at first sat exclusively behind closed doors, indeed, even the House of Representatives occasionally barred the public Strong objection, however, arose, and in 1793 the Senate adopted the wiser course of opening its doors whenever engaged in ordinary legislative business and closing them only during "executive" sittings, *i e*, sittings in which only business directly shared with the executive was considered The last closed meeting of the House was held not long afterwards, in 1811 On the theory that the Senate should be free to discuss treaties, presidential appointments, and sometimes other matters, without publicity being given to anything said, privacy for executive sessions was maintained for nearly a century and a half Eventually, however, it too broke down, partly because in later decades enterprising press correspondents found ways of ascertaining practically everything said and done in private sessions, but especially because of growing opinion, both in and out of the Senate, that, save under the most exceptional circumstances, the public is quite as much entitled to know the views expressed and the position taken by individual senators on appointments and treaties as on anything else The matter was brought to a head in 1929 by unauthorized publication of senatorial votes on the hotly contested confirmation of a judge of the Court of Customs Appeals, and the outcome of an exciting debate was the adoption of a new rule under which all business previously handled behind closed doors has since been considered in "open executive session" unless decided to the contrary by majority vote

[19] On the various forms of presidential veto see p 260 below

Published records

The constitution requires both houses to keep a journal and to publish it "from time to time" The journals are, however, bare records of bills introduced reports presented, and votes taken—that is, minutes of official actions, not records of debates For a long time, debates in the House of Representatives were not reported except in a haphazard way in some of the better newspapers, and Senate debates were practically not reported at all, although general accounts of what went on in that body frequently were printed, as were occasional speeches [20] In 1833, the *Congressional Globe*, presenting the debates verbatim, was started as a private venture, and in 1873 its place was taken by the present *Congressional Record*, prepared by officers of Congress and printed by the government Published daily during sessions, the *Record* purports to give an exact stenographic reproduction of everything said on the floor of the two houses—save, of course, during closed sessions This, however, it does not actually do partly because members sometimes edit their remarks in such a way as to make important changes in them, and also because, in the case of the House, speeches are frequently printed, under special leave, which never were delivered by word of mouth at all The Senate does not permit the inclusion of undelivered speeches, but is quite as liberal as the House in allowing members to put into the *Record* correspondence, editorials, public documents speeches of members on public occasions, magazine articles, and selections from books, which have not been read in debate, and this is one of the reasons why the *Record* runs every year to several thousand paged volumes of generous triple-columned pages

1 Proceedings

2 Statutes

After being received by the General Services Administration, all acts and joint resolutions, duly renumbered, are printed for distribution in the form of separate "slip laws", and after the close of a year all for the period are collected, indexed, and published in an official final edition under the title of *Statutes at Large of the United States*—one volume containing all public acts and joint resolutions, and a second, private acts and joint resolutions, concurrent resolutions, treaties, and presidential proclamations [21]

## HOUSE-SENATE OSCILLATIONS

Although the framers of the constitution attached great significance to the Senate as a checking and revising body, and as a medium for preserving the dignities and powers of the states, the legislative center of gravity for a generation or more was clearly in the House of Representatives, as indeed the framers intended it to be After 1830, however, the Senate attained greatly increased importance, becoming the main forum of public discussion and legislative activity in the period of burning issues preceding secession and the Civil War During the remainder of the century, predominance oscillated, with the

[illegible] 1834 [illegible] vols [illegible] ources [illegible] h they [illegible] will be [illegible] up to date by an annual cumulative supplement

House in the ascendant during Reconstruction, the Senate again during the eighties, and the House once more after 1890 or 1895, partly because of reaction against the Senate's high claims to authority (particularly in the domain of foreign relations), but mainly because of the disturbing proportion of senators whose principal claim to distinction was wealth, corporate connections, or cleverness in political manipulation. After 1910, however, the balance tipped again, and today the Senate, if not actually predominant, is at all events at a higher altitude than three or four decades ago, and probably still rising.

The Senate's advantages

Nor is senatorial ascendancy a mere matter of luck or chance; substantial reasons for it can be found in various advantages which the upper house enjoys as compared with the lower. Its members are, on the average, somewhat older, have wider knowledge of public affairs, and, in particular, have more legislative experience because of longer terms, more numerous reelections, and continuous recruiting of vigorous members from the lower house. Its members, too, commonly are more important as party leaders within their states (and in some cases nationally) than are representatives. Their smaller number gives men of talent a better chance to show their mettle and become known to the country at large. With rare exceptions, senators enjoy far more patronage than do representatives, and the Senate's special powers of confirming appointments and assenting to the ratification of treaties place in its hands weapons which can be employed formidably in relation to other matters as well. Finally, while it unhappily remains true, as Lord Bryce asserted many years ago, that neither branch of Congress attracts the best talent of the nation, the upper house tends to absorb, sooner or later, the best that enters political life, including abler members of the lower house who top off their careers in the Senate. Certainly the Senate today contains fewer men of wealth, and decidedly fewer political bosses of the Hanna-Quay-Platt type, than 40 or 50 years ago. By the same token—and notwithstanding reactionaries on both sides of the center aisle—it is less conservative than formerly; indeed, an examination of the records would probably give it a claim to be regarded as on the whole more liberal and progressive than the other branch. On the average, debate (except during filibustering outbursts) is on a higher plane, greater interest has been manifested in curbing the abuses of lobbying, support for the legislative modernization of 1946 was more wholehearted—support, indeed, for more reorganization than the House was willing to accept. Under existing rules of procedure, it is true, demagogues occasionally run riot and bring the body into disrepute and even contempt. The general membership, too, sometimes is swayed by partisan passion and prone to "play politics," as is that of the House. By and large, however, the Senate contains a larger proportion of members whose speeches and votes show independence of spirit and judgment, and, while handicapped by the propensity of mediocre members to stand stiffly on their rights under the rules and try the patience of the country with their obstinacy or buffoonery, it is composed, in at least as large degree as the House, of men who are able, industrious, fair-minded, sparing in speech, and anxious to get on with the public business.

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## CHAPTER 17

# The President and Congress

'Presidential' and 'cabinet' government

When the framers of our federal constitution decided to distribute national powers among three coordinate sets of authorities—president, Congress, and courts—they in effect ordained that we should have a "presidential," rather than a "cabinet," or "parliamentary," form of government. In a cabinet or parliamentary system,[1] a titular chief executive may indeed be called president, as in France, conversely, in a presidential system there is likely to be a cabinet, as in the United States. But the two are fundamentally different in that (1) under a cabinet system, the actual operating executive consists of ministers (functioning together as a cabinet) who are at the same time members of the legislature, whereas a presidential executive is outside of the legislature and usually draws his authority independently from the same source, i.e., popular election, and (2) under a cabinet system, the ministers are individually and collectively responsible to the legislature (at least to the more popular branch) and remain in office only so long as they enjoy the confidence and support of a legislative majority, whereas a presidential executive is not "responsible" but instead coordinate, has a fixed term, and can be turned out of office only by the extreme and unusual procedure of impeachment. Bringing the operating executive into the legislature, and giving it every opportunity for legislative leadership at close range, the cabinet plan has the obvious advantage of insuring that legislature and executive never will long be in disagreement on important matters, or working at cross purposes, because, under the principle of responsibility, ministers losing majority support give way—either at once or perchance after a parliamentary election has gone against them—to others able to command confidence, and harmony again prevails. Under the

of protracted dis

until fixed terms

good many people regard it as unfortunate that we started off with such a system, and consider that, if it could be contrived, we should go over to the cabinet plan, even at this late date.

[1] The two terms are used interchangeably according as one is viewing the system primarily from the side of the executive or from that of the legislature.

[2] Under our American system even this does not wholly assure relief because even after elections there may be a Democratic president and a Republican Congress (as in 1947-48) or *vice versa*.

Legislative-executive relations in the United States

Under our existing system nevertheless, the national legislature and the national executive, *i e* Congress and the president—although far more distinct and separate *foci* of political power than are to be found in any cabinet government—are by no means completely isolated from each other Constitutionally, it is true "*all* legislative powers," are vested in the one and *the* executive power in the other This however, was not meant to prevent one from sharing in the functions of the other, and while *no more challenging* problem engages the attention of students of our government than that of coordinating and improving the relations between the two, president and Congress *already are jointly the architects of most of our national legislation and public* policy How this comes about must now receive attention—with respect to (1) the president s constitutional springboards for influencing legislation, (2) various extraconstitutional procedures and techniques at his command, and (3) certain over all circumstances which have contributed to making him as indeed he truly is, our chief legislator as well as chief executive

## THE PRESIDENT'S PART IN LEGISLATION—THE CONSTITUTIONAL PHASE

1 Control over sessions of Congress

Over the beginning and ending of the regular annual sessions of Congress, the president has no constitutional authority except that if the two houses cannot agree on a time of adjournment, he may adjourn them ' to such time as he shall think proper As a matter of practice he may keep the two houses at work longer than they otherwise would have remained—as did President Franklin D Roosevelt in 1934 1935, and 1937—by insisting upon a "must program of legislation and in 1948 President Truman even called a Congress back to Washington after it had gone home without expectation of returning But no presidential decree of adjournment ever has proved necessary One other constitutional power is that of convening the two houses, or either of them in special session, and in earlier days, when the second regular session of every Congress (the short session ) ended on March 4, with the next regular session not starting until the following December, special sessions were fairly numerous—especially in years (like 1909, 1913, 1921, 1929 and 1933) when a new Administration with a legislative program to be pushed and new appointments to be confirmed, took office just as a short session closed Under the new calendar introduced by the Twentieth Amendment however, there is less need for such sessions, because (1) the intervals between regular sessions are shorter and (2) an incoming president finds a new Congress already started on its first regular session Except for the session in 1948 mentioned above, there has not been a special session since the autumn of 1939, when one was required by circumstances connected with the outbreak of war in Europe

2 Messages

The constitution s requirement that the president give Congress information on ' the state of the Union' and recommend for its consideration ' such measures as he *shall judge necessary and expedient* [3] *is entirely logical* His

[3] Art II § 3

peculiar vantage point enables him to know many things about both foreign and domestic affairs that are beyond the ken of the members of the legislative branch, he can speak from an over-all view, and commonly with authority, in pointing out defects and needs, and can suggest remedies in line with actual executive and administrative experience, and he is equally obligated with Congress to put information and ideas at the country's service [4]

**Occasions**

How frequently the president shall communicate with Congress by message, at what times, at what length, and in what manner, the constitution does not say, and, within limits, each president exercises his own discretion It long ago became customary, however, to transmit at the opening of each regular session a comprehensive 'state of the union' message summarizing the situation of public affairs, calling attention to matters requiring early consideration, and perhaps indicating definite legislation which, in the president's judgment, ought to be enacted Under present practice, too, this is followed —usually within three or four days—by a message transmitting the annual budget And under terms of an Employment Act of 1946 there must come at the opening of a regular session a 'national production and employment budget," or economic report, based on studies by the Council of Economic Advisers and setting forth the policies which in the chief executive's judgment should be pursued in order to keep the country's economic life on an even keel Nowadays, therefore, these three messages—all framed with much assistance (even in drafting) from Budget Bureau and other officials—may be counted upon whenever a new session starts In addition, special messages—sometimes a score or more during a session, usually briefer, and each commonly dealing with some specific subject or project—are transmitted as occasion demands or the president desires

**Oral and written messages**

Washington and John Adams appeared in person before the two houses in joint session and delivered their more important messages orally Jefferson, however, transmitted his messages in writing to be read by clerks, and this practice prevailed until 1913, when, somewhat to the consternation of Congress, the oral form was revived by President Wilson Oral messages were employed by President Harding, and, with the aid of the radio, President Coolidge read his first two "state of the union' messages to both Congress and the country Shunning the ceremony of personal appearance, President Hoover reverted to the written message, President Franklin D Roosevelt employed first one form and then the other, and President Truman has inclined somewhat toward the oral form—which, however, is, of course, commonly not feasible except for "state of the union" messages and special messages of unusual importance Oral messages nowadays invariably are broadcast, and probably in time will be televised

**The effects of messages**

How much influence presidential messages exert is a matter upon which it is difficult to generalize Certainly they receive more publicity than do most government documents Except, however, in the case of the two messages

[4] To prevent presidential experience from being lost when a chief executive goes out of office it has been proposed that ex presidents be made non voting senators at large for the remainder of their lives and a bill to this effect favored by President Truman and by ex President Hoover was introduced by Senator Owen Brewster in 1949 although not passed

transmitting the fiscal and "economic" budgets, Congress is under no obligation beyond giving a respectful hearing, even the two mentioned may not eventuate in all of the actions desired, while as for the rest, the two houses may act quite contrary to the recommendations made, or may refuse or neglect to act at all Much depends, of course, upon whether the president's party is in control at both ends of the Capitol But even if it is, there is—as President Truman could mournfully testify, in connection, for example, with his civil rights program—no guarantee that his requests will be met

Sometimes a message really is aimed at the country, or even at the world at large rather than at Congress The president may want to build a fire under an uncooperative Congress by provoking a bombardment of members with letters and telegrams from aroused constituents Or he may wish to make his Administration s attitude known to a foreign state or group of states without incurring the embarrassments that might flow from resort to the customary diplomatic channels, as, for example, when Monroe, in 1823, slipped into his annual message to Congress statements serving notice to the European powers that the American continents were no longer open to new colonization, thus laying the basis for the significant national policy ever since known as the Monroe Doctrine In numerous oral messages during World War I, President Wilson summed up and unified the thought of the country on submarine warfare and other challenging aspects of the international situation, likewise, in his message of January 2, 1918, he set forth, virtually on behalf of the Allied and Associated Powers and in the form of his famous "Fourteen Points," the major terms or conditions deemed indispensable to a peace settlement From Franklin D Roosevelt s messages during his second and third administrations, one could arrive at a tolerably complete picture of the country s developing foreign policy in a period of growing tension and ultimate war

3 Legislative initiative

By requiring the president to recommend to Congress "such measures as he shall judge necessary and expedient" the constitution not only empowers the president to initiate legislation, but invites him to do so, and, as we have seen, a considerable proportion of the public bills crowding the calendars of Congress—three-fourths of the 77 major ones passed during Franklin D Roosevelt s first administration—emanate from the branch of government for which the president is primarily responsible Many of these, it is true, are more or less routine—extending interpreting, or modifying statutes to meet needs that administrative experience has brought to light, and with these the president personally may have little or no connection But others are of first rate importance—breaking new ground, introducing new policies, starting lines of action that will vitally affect large numbers of people Even these may originate in executive departments or independent establishments, indeed, most of them do so But either they will have been inspired or encouraged by the president or at least his support for them will have been sought, because an administrative agency going to Congress for legislation will almost always want to do so with the advantage of presidential backing

Some such measures win their way into the chief executive's legislative program, others do not But in any case there commonly *is* a presidential program.

and in it will be found not only projects which have been brought to the White House by the administrators, but others, and perhaps larger ones, for which the president personally bears primary, if not sole, responsibility The chief executive may be deeply concerned about far reaching changes and reforms, as was Theodore Roosevelt about the regulation of corporation procedures, or Woodrow Wilson about the improvement of banking and business practices, or Harry S Truman about strengthening and extending civil rights National difficulties may press upon him as they did upon Herbert Hoover A national crisis may confront him, as a disastrous banking situation confronted Franklin D Roosevelt when he first took office in 1933 and later an international threat, when, in 1940, the world situation suddenly thrust upon the country the necessity of embarking upon a stupendous program of defense But whether or not such special conditions exist the chief executive will find that if he is to measure up to what the country expects of him, he must put much of his best energy into thinking about laws that ought to be enacted, working with appropriate subordinates and advisers in formulating them, seeing that they are duly introduced in the House or Senate and using his influence to get them on the statute book

4 Guidance in finance

In the domain of finance the president s relations with Congress are particularly close Never having developed any effective agency of its own for attaining cooperation between the two houses or for formulating policy, with respect to the budget as a whole, the legislative branch depends heavily upon the executive for leadership, and the Budget and Accounting Act of 1921 made the president, through the director of the budget, virtually the general business manager of the government [5] In that capacity, he annually transmits to Congress full information concerning the national finances together with a coordinated fiscal plan for the coming year including proposals for taxation As occasion requires he submits supplementary requests for appropriations And while the two houses are not obliged to meet his demands in full, or, on the other hand, to stay within the limits of expenditure which he recommends, they are likely to hear from him in no uncertain terms if they fail to do either

## THE VETO POWER

5 The veto power—constitutional basis

Next in the list of presidential controls over legislation we encounter the power to disapprove bills and joint resolutions passed by Congress Recollection of experience with later colonial governors left the executive veto in no very high favor with the generation that saw *the constitution adopted* The builders of the new federal system had in mind, however, a balanced government in which each branch should be prevented from encroaching upon the rights or absorbing the powers of the other branches, and the most feasible means of protecting the executive against encroachments by the legislature seemed to be the power of veto Furthermore, as Hamilton urged in *The Federalist*, the veto would ' furnish an additional security against the enaction of improper laws " Accordingly, the constitution requires that every bill which

[5] See p 362 below

shall have passed the two houses of Congress shall, before it becomes law, be presented to the president, who, if he approves, shall sign it, and if he disapproves, then return it, with his objections, to the house in which it originated, and it shall then become law only if both houses, by two-thirds (and yea and nay) vote, again pass it [6]

Courses open to the president on a bill or resolution

When, under this formula, a bill or joint resolution is passed by the two branches and sent to the White House, any one of four things may happen

1 The president may promptly sign it whereupon it becomes law.

2 He may hold it without either signing or vetoing it, in which case it becomes law at the expiration of 10 days (Sundays excepted), without his signature, provided Congress still is in session He may adopt this course because he dislikes the measure and is unwill [illegible] recognizing that a [illegible] he is undecided ab [illegible] general merit and prefers not to commit himself

3 He may hold th [illegible] —and by so doing [illegible] of obviating the ne [illegible] planation to Congress (sometimes politically di advantageous) a 'pocket' veto may, from the president's point of view, be preferable to a direct, or "messaged," veto, and many bills come to grief in this way, particularly by reason of the fact that as a rule considerable numbers of measures are rushed th [illegible] days of a session and [illegible] off the statute- [illegible]

4 A bill m [illegible] vetoed outright That is to say, the president may expressly disapprove it, in which case it goes back, with a message giving his reasons,[7] to the house in which it originated

Even though resulting from mere inaction, a pocket veto is the strongest of all, because there is no opportunity for Congress to reverse it A direct, or "messaged" veto, on the other hand, is only suspensive It makes congressional reconsideration necessary it gives the president a chance to put his objections squarely before the two houses, and the two-thirds requirement makes a second passage more difficult than the first But such a veto does not kill a measure for which a sufficient amount of legislative support can be mustered

Frequency of vetoes

In the *Federalist* paper quoted above, Hamilton ventured the prediction that the veto would "generally be employed with great caution," and that there would be more danger of the president "not using his power when necessary, than of his using it too often, or too much" For several decades, this forecast was borne out. Not until Andrew Johnson's administration did any president deem it necessary to resort to a veto in defense of [illegible] rights, and altogether it has [illegible] times Indeed, there were [illegible] Civil War Except on three occasions, the fi [illegible] presidents vetoed bills only as being uncon-

[6] Art I § 7 cl 2

[7] The message usually is drafted by the department or agency most affected and afterwards scrutinized by the Budget Bureau and the Department of Justice Originating in a quarter deeply concerned it may be in a tone hardly to be described as conciliatory

stitutional or technically defective Jackson, who in sundry ways made the presidency something different from what it had been before, gave the veto a new twist by employing it to stifle measures conceded to be constitutional and technically correct, but considered objectionable in aim and content Yet Jackson, in eight years, vetoed only 12 bills In the turbulent era of Reconstruction, the veto was employed more freely, and later presidents have not taken the conservative attitude of their remoter predecessors Except in the cases of Grover Cleveland, Franklin D Roosevelt, and Harry S Truman, however, the number of vetoes rarely has averaged more than five or six a year, among them, those three presidents are responsible for more than 76 per cent of all presidential vetoes in the country's history—in the case of Cleveland a total of 584, in that of Roosevelt, 631, and in that of Truman—to December, 1951—228

General expansion of the veto power

The most important thing is not, however, the mere increase in the number of vetoes Of greater significance is the freedom with which presidents, as one writer has put it, "offset their own judgment against that of Congress, not merely on great questions involving the public welfare, and on disputed constitutional questions, but on trivial matters whereon their means of information are not greater or better than those at the command of Congress, and whereon their individual judgment does not appear to be superior to that of the average congressman or senator" [8] In other words, the veto power has been so expanded by usage as to become a general revising power, applicable to all legislation, whether important or not and whether relating to public matters or to private and personal interests The result has been to make the president a far more active and potent factor in legislation than he originally was or was intended to be

Few vetoes overridden by Congress

This does not mean, however, that the veto power has, in these later days, been used loosely and irresponsibly On the contrary, it has commonly been employed reluctantly and with due discretion Most vetoes of measures important enough to have attracted popular attention have been supported by a good deal of public sentiment, and comparatively few have been overridden by subsequent action of Congress Not until Tyler's administration did any vetoed bill receive the two-thirds vote in both houses necessary to make it law Cleveland was reversed seven times, and Wilson six, but Coolidge only four times, Hoover, three times, Harrison, Theodore Roosevelt, and Taft, once each, and McKinley and Harding not at all Even Franklin D Roosevelt's reversals numbered only nine and Truman's twelve (to Dec, 1951) In practice, therefore, the direct, messaged veto tends to become almost as absolute as the pocket variety, only rarely and with great difficulty can sufficient votes be mustered in the two houses to override an unfavorable presidential decision [9] This has led to the suggestion that the veto power be weakened by making it possible for a vetoed measure ultimately to prevail by being repassed in the two houses by a simple majority (as is the rule in a number of states), rather

... 1909 to 1916 (new ed., Boston, 1928), 324

... Truman vetoes were overridden ... a vendetta between the President ... "worst.

than the present two-thirds Some people, however, would strengthen the veto by requiring two-thirds of the entire membership of each house instead of merely two-thirds of a quorum in each [10]

## THE PRESIDENT'S PART IN LEGISLATION—EXTRACONSTITUTIONAL WEAPONS AND TECHNIQUES

Threat, persuasion and public appeal

Convening Congress in special session, sending messages (or delivering them orally), initiating bills, transmitting budget proposals, and wielding the veto power by no means exhaust the president's resources in influencing legislation (1) By letting it be known that he will veto a given bill unless specified changes are made in it, he may be able virtually to determine the form which the measure finally will take, or even to prevent it from being passed at all, indeed, he may thus head off a bill before it has been introduced (2) By turning a deaf ear to the pleas of senators and representatives for patronage, he may subject them to backfire from their office hungry constituents and imperil their chances of reelection unless they support legislation in which he is interested (3) By withholding words of endorsement at election (including primary) time, or perchance by openly expressing hostility, he—as in the case of President Truman's "purge" of Representative Roger Slaughter of Missouri in 1946—likewise may make it difficult or impossible for members of his party who have opposed his policies to win at the polls (4) Although forbidden by custom to appear on the floor of either branch of Congress for any purpose other than to deliver a formal message, there is nothing to prevent him from discussing measures and policies with any number of leaders and members, individually or in small groups, in his office or his study at the White House, over the griddle cakes and sausages at the breakfast table, or in the room set apart for him in the Capitol [11] His arts on such occasions may range from genial encouragement or gentle persuasion to bold ultimatum, although of course he may be induced to accept amendments to bills which he favors, or even to make important changes in his general legislative program (5) By utilizing his unsurpassed opportunities for publicity and by systematically cultivating popular approval for his policies—through public addresses, press conferences, greetings to organizations and meetings, letters nominally to private individuals but intended for the public, and notably in these latter days fireside talks to the people by radio (in the fashion so successfully employed by the mellifluous-voiced Franklin D Roosevelt)—he may

[10] Another and more important, proposal looking to strengthening the veto is that the president (like the governor in all but nine states) be empowered to single out individual items in an appropriation bill as extravagant or otherwise objectionable and veto them while nevertheless approving the measure as a whole When however President Franklin D Roosevelt, in 1938 asked Congress for such sifting authority, he was refused—partly on the ground that his request properly could be met only by a constitutional amendment As an alternative it has been proposed that appropriation acts individually carry clauses authorizing veto of items contained in them This however would be of doubtful constitutionality, even if Congress would have any interest in conferring such power

[11] For several years fairly regular weekly conferences at the White House have been participated in by the president and the so-called "Big Four", *i e* the speaker and majority leader of the House and the president (or president *pro tempore*) and majority leader of the Senate Such conferences, however, presuppose common party membership

build and maintain a public opinion which congressmen will hesitate to antagonize or ignore If all else fails, he may appeal directly to the nation against Congress, and Theodore Roosevelt, Woodrow Wilson, and Harry S Truman have done so—although such a course is risky, and hardly to be undertaken save by a president of genuine stature and having a decidedly good case Wilson lost his health in a vain appeal on the League of Nations issue

Opportunity for leadership

1 The party aspect

Certain practical situations operate to the president's advantage in employing the constitutional powers and extraconstitutional techniques enumerated First of all is his position as leader of his party Originally, the chief executive was not a party man, Washington thought of himself as identified with no party and chief of no faction When, however, parties came into the field and presidents began to be elected as party standardbearers, party leadership became as truly a function of the president as of the British prime minister, and nowadays is a hardly less important source of power than is the authority conferred in the constitution itself Chosen as a party man to head a government operated under a party system, the president surrounds himself with advisers of his own political faith consults chiefly his fellow-partisans in Congress on proposed appointments, confers mainly with their leaders on the framing of policy, and depends primarily on their loyalty and support for realization of his legislative program He represents the party throughout the entire country, as members of Congress do not, and the country looks to him, even more than to Congress, for fulfillment of the pledges which his party has made This gives him an important leverage in his dealings with Congress—although obviously the effectiveness of it at any given time will depend largely, not only upon his own skill in capitalizing upon it, but upon how favorable the party situation is in the two houses The time for a president to translate his party leadership into legislative performance is normally when party loyalty and spirit are running strong, and party votes are plentiful, as a result of victory at the polls Later, his leadership will probably have to be directed principally to repairing damage wrought by defeats, schisms, and other set-backs

2 The need of Congress

Another situation strongly favorable to presidential influence upon legislation is the need on Capitol Hill for leadership and direction from some outside source Experience shows that Congress, when left to its own devices, tends to disintegrate into minority, partisan, and sectional elements and to flounder in a bog of contrary purposes Even if there is capable and recognized leadership in the houses singly, there usually is no one save the president to bring the two branches together in effective support of great policies and measures On plenty of occasions, senators and representatives manifest resentment when exhorted, advised, or pressured from "down town", yet when a new path is to be hewed, they almost invariably hesitate and show confusion until and unless a directing hand points the way and a commanding voice urges to action In other words, Congress works well only under stimulus and pressure, which may, of course, come ultimately from public opinion, or even from party motivation, but in any case usually needs to be transmitted or applied by the president

3 Public demand

Finally, there is the circumstance that, more and more, the people look to the president, not simply to coordinate and direct the national administration and to speak for the country in dealings with foreign governments, but to develop well-conceived lines of domestic policy, to propose the legislation necessary for carrying out such policy, and to exert enough pressure upon Congress to get this legislation enacted They expect him, indeed, to "manage Congress, and if through lack of political skill, or because of adverse circum stances too difficult to be overcome, he does not do so, they (justly or unjustly) pronounce him a failure In other words, they regard him as 'head of the government legislative branch as well as executive, and hold him responsible accordingly—a situation from which he draws grave perils but also high challenge and inspiring opportunity

An illus tration

There are times when ordinary legislative leadership, and even the leadership of party, merges into a broad national leadership transcending all political and other dividing lines Naturally, these are most likely to be periods of grave national stress Such leadership was Lincoln s in the earlier stages of the Civil War and Wilson s while the United States was involved in World War I Such a leadership also was that of Franklin D Roosevelt in the first two years of his presidency—easily the most remarkable that the country has known in days of peace, although of course rivaled by the same chief executive's leadership in the defense effort of 1940-41 and in the later war Taking office at a time when fast accumulating economic disorders had come to a head in a banking crisis of major proportions—and with the legislative branch giving no indication that it had anything to offer—the new chief executive struck a bold note in his inaugural address by declaring not only that there must be quick action but that, while it was to be hoped that the "normal balance of executive and legislative authority" would prove adequate to the situation, he was prepared, in the event that Congress should fail to do its part, to ask that body 'for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe "

The new Congress having been convoked in special session the President became chief lawmaker to a degree certainly never before witnessed in the country's history A rapid fire of messages descended upon Capitol Hill, and when each was presented, a spokesman of the Administration stood ready to introduce a bill (originating also in, or at all events sponsored by, the White House) covering the proposals made In a session lasting 100 days, only one important bill was passed which did not have such a history To be sure, some of the measures encountered opposition within the president's party and were amended in committee, or even on the floor By and large, however, the function of Congress was merely to agree, on as far-reaching a measure as the Farm Relief Bill (giving rise to the memorable Agricultural Adjustment Administration), only four hours of debate were allowed in the House with no amendments permitted Messages and proposals were strategically timed, telephone calls from the White House admonished or warned the hesitant, radio talks to the nation reassured the troubled and inspired sentiment that

no congressman could ignore And all was done with manifest public approval A frightened people wanted action, and a bold president was prepared to see that they got it

As was to be expected, popular applause later died down, and a hesitant or frankly critical attitude developed toward much that had been done, the Supreme Court, indeed, declared important parts of the recovery legislation unconstitutional But the matter of interest here is the height to which presidential leadership ascended and the techniques by which it was sustained Legislative leadership from the White House moreover, did not abdicate when the first round of remedial measures had been passed On the contrary, many of those more or less temporary expedients were dovetailed into schemes, for comprehensive and permanent rehabilitation and reform—schemes, *e g*, that for a nation wide system of social security, which later were relayed to Congress in the form of urgent recommendations or of fully drafted bills, and in large part were later enacted into law Not only during the emergency, but for almost a decade, nearly all significant national legislation originated in this way

## CONTROL OVER THE PRESIDENT BY CONGRESS

*Con[illegible]* [illegible]

The emphasis thus far placed upon the president s lofty rôle must not be allowed to obscure the fact that, as between executive and legislature, influence and control do not flow in only a single direction, for the president, in his turn, is subject to considerable restraint and in the final analysis to a good deal of direct control, from Congress Few indeed of his powers can be exercised without spending money, and for money he is absolutely dependent upon Congress Few, likewise, can be exercised except through departments, commissions and other agencies for the establishment and maintena[illegible] of which he is similarly dependent For enactment of the legislation he de[illegible], he must rely upon Congress He must get senatorial consent to his app[illegible] ments and his treaties He can bring on war independently but wage it [illegible] Congress supports it His vetoes can be overridden in the two hous[illegible] every act (personal or through subordinates) can be looked into and cr[illegible] and some of them can be reversed If worst comes to worst, he ca[illegible] peached and removed from office

[illegible]

fu[illegible]

in[illegible]

hi[illegible]

may make "requests" (not—at least in form—*demands*) upon [illegible] ments or information which he cannot well withhold, however [illegible] prefer to do so, or may institute investigations of executive [illegible] activities for which he is directly or indirectly responsible Co[illegible] laws imposing new and unwanted duties upon him or his [illegible] may limit the discretion of heads of departments or other [illegible] them to do given things in a given way, irrespective of the [illegible]

Even a supposedly friendly Congress may flout the Administration's program again and again (President Truman is not the first chief executive to have bitter experience at this point)—the Senate, in particular, being prone to assume an attitude best described as "baiting the president." The spectacle may not be edifying, and the country's interests may suffer. But the resulting confusion, delay, and futility are part of the price we pay for our historic system of separation of powers.[12]

## A GENERAL VIEW OF PRESIDENTIAL POWER

A hundred years of cumulative development

"The waters of democracy," Woodrow Wilson once wrote, "are useless in their reservoirs unless they may be used to drive the wheels of policy and administration." And it is the experience of practically all democracies not only that leadership is the only means by which latent power can be converted into action, but that the requisite leadership can be supplied only by the executive. In Great Britain, Canada, and other countries having a cabinet system, this means the ministers, in the United States, it means the president.

At the stage which our study has reached, it must be sufficiently obvious that a salient feature of the presidency is its prolonged accumulation of power—by constitutional endowment, by legislative delegation, by judicial construction, by custom and practice—in enforcement of law, in conduct of foreign relations and of war, in use of the veto, and in shaping public policy as controlled ostensibly by the legislative branch. The earliest chief executives, being "just about what the framers of the constitution expected the incumbents of the office to be," took a comparatively modest view of their own authority. Jackson, however, brought to the White House not only a resolute disposition, but an impatience with restrictions and with conservative traditions, which was characteristic of the section from which he came and of the generation in which he lived. In his hands, the presidency became a far more potent instrumentality than before, and although after his day the office had its ups and downs, as it passed from stronger to weaker hands and back again, and as the times demanded of the chief executive a vigorous rôle or permitted a more passive one, hardly any later incumbent ever willingly gave up a particle of power once successfully asserted.[13] On the contrary, every fresh advance became, in turn (perhaps after an interval of inaction), a point of departure from which still more exalted claims to authority were projected, and under Franklin D. Roosevelt, notwithstanding occasional setbacks, a peak was reached transcending all that had gone before.[14]

Basic factors summarized

The reasons for this extraordinary development are not to be found in motivations springing from personal pride and ambition. Most of the presidents, being human, have found pleasure in the exercise of authority, but few, if any,

[12] Practically all of the matters referred to in this paragraph ... will be discussed

have coveted power for its own sake Presidential preeminence has reached its present proportions for other reasons fairly obvious One is the tremendous growth of the functions and activities of the federal government, and of the administrative machinery (falling within the president's particular province) required for carrying on the government's work Another is the development of what is to all intents and purposes direct popular election, giving the chief executive a rightful claim to be regarded as no less an organ of the national will than is Congress Still another is the decline rather commonly considered to have taken place in the past half-century in the resourcefulness and efficiency of Congress, opening the way for larger presidential initiative and control A fourth, related to the foregoing, is the imperative need for leadership and direction in legislation and general policy framing—a need for which our system makes no provision, and which there is no way of meeting except primarily through the president A contributing factor of vast importance, too, has been a succession of great national emergencies—the Civil War, World War I, the depression of the thirties, the perilous international situation created by the Nazis and the Fascists, World War II, and finally the "cold war" with the U S S R during these later years—all inevitably making national leadership a supreme concern and forcing presidential power to new levels

**The president not a dictator**

Of the three branches into which our national government is divided, the executive has advanced farthest from the point at which it started The judiciary has considerably more than held its own, mainly because of its power to review legislative and executive acts The legislative branch has run a poor third Plenty of people do not like what has been going on, and there is no denying that the balance envisaged by the constitutional fathers has to a considerable extent been upset Even in Jefferson's day, the ugly charge of dictatorship was hurled in the president's direction Jackson, Lincoln, the first Roosevelt, certainly the later Roosevelt, and also Truman, incurred similar criticism Thinking only, however, of the times through which we ourselves have lived, those who view with alarm the heights to which the presidency has soared would have great difficulty in showing how important things needing to be done could have been done otherwise than through presidential initiative, direction, and drive They would have to admit, too, that some of the powers deplored have been deliberately voted to the chief executive by the people's representatives in Congress And, whether or not the critics could be argued into conceding it, the fact remains that strong and unified government does not necessarily mean arbitrary government, nor a powerful chief executive a dictator Despite all, the president still is a responsible servant of the people, and such he will remain as long as the constitutional and popular controls inherent in our representative system endure

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## CHAPTER 18

# The Improvement of Congress and Legislative-Executive Relations

*Some extreme charges*

It long has been a familiar experience to hear Congress lampooned, censured, abused—by editors, columnists, radio commentators, publicists, and occasionally even by congressmen themselves In endless chorus, we have been told that the two houses are inefficient, irresponsible, dilatory, extravagant, provincial, wanting in vision, and suffused with demagogy If the situation is half as bad as some people would have us believe, our American representative system is indeed working poorly

*The situation not as bad as painted*

Fortunately, the often careless and indiscriminate criticisms dinned into our ears rarely are supported by the facts Undeniably, Congress, as it operates, shows plenty of imperfections But there is no reason to believe that the character and caliber of its members are any lower than 50 or 100 years ago, many of them will risk political defeat rather than vote contrary to their convictions, and of malfeasance, there are occasional shocking instances, but on the whole no great amount Times have changed, and the ponderous oratory that once resounded through crowded halls has given way to less ornate discussion, but, as an eminent authority has remarked, the quality of serious speeches in both houses still is "amazingly high" [1] Much of the complaint that one hears is merely partisan, captious, and irresponsible Much of it springs from the disappointment or exasperation of people whose pet projects have come to grief (often deservedly), or whose notions of what ought to be done have not happened to coincide with those of the congressional majority No Congress, however efficient, could hope to please everybody—nor, indeed, in all respects to please anybody Do what they may, or do nothing at all, the members are bound to encounter disapproval and complaint The truth is that, notwithstanding frequent waste of time and misdirection of effort, a vast amount of careful and intelligent work is done on Capitol Hill, especially in the great committees, and that, notwithstanding the increasingly complicated and critical matters with which they have to deal, the two houses somehow succeed in placing on the statute book numerous measures representing honest attempts to promote the public well being and backed by a heavy volume of favorable public sentiment A stream does not rise higher than its source, by

[1] C. A Beard in *Amer Mercury* LV 531 (Nov., 1942)

and large, Congress is no better, and no worse, than the people from which it springs

## PROGRESS OF CONGRESSIONAL IMPROVEMENT

Some earlier advances

During the first three decades of the present century, the position of Congress was materially improved by several reforms (1) in 1910-11, the "dictatorship' of the speaker of the House was curbed, (2) in 1913, all senators became popularly elective, (3) in 1920, the electoral base for both branches was broadened by the enfranchisement of women, (4) in 1921, a Budget and Accounting Act improved the handling of national finances by introducing a budget system, (5) in 1921, the Senate, and in 1927 the House, reconstructed its standing committees, reducing the number sharply although not as much as would have been desirable, (6) in 1933, the short, or 'lame duck,' session became a thing of the past As time went on, however, and especially during the Roosevelt period, it became manifest that if the two houses were in future to hold their own in growing competition with executive power, to meet the challenges of a new and difficult age, to serve the nation in the fashion which their basic function in our political system presupposes, and to recover impaired popular confidence and prestige, Congress would have to be still further overhauled and, in particular, liberated from handicaps—some self-imposed, some otherwise—operating to shackle it in the performance of its work

The Legislative Reorganization Act of 1946

Perhaps wartime exigencies were required to drive the challenge home At all events, during the two years covered by the Seventy-eighth Congress (1943-45), more than 50 proposals for particular improvements, or in some instances for a general program of reform, were introduced in the two houses, and while none prevailed, a joint resolution of December, 1944, took the significant step of creating a bipartisan Joint Committee on the Organization of Congress, composed of six members of each branch and charged with devising and recommending plans "with a view toward strengthening Congress, simplifying its operations, improving its relationships with other branches of the United States Government, and enabling it to meet its responsibilities under the constitution ' Taking its task seriously, the committee (with Senator Robert M LaFollette, Jr, as chairman) held hearings and carried on studies for more than a year, until finally, early in 1946, it was ready with a report going to the root of many organizational difficulties and proposing extensive changes [2] Meeting at first a somewhat cool reception—especially from committees that did not want to be abolished and from committee chairmen who did not want to be legislated out of their positions and perquisites

[2] Joint Committee on the Organization of Congress *Organization of the Congress* 79th Cong 2nd Sess Sen Rep No 1011 (1946) Influential in preparing the way for this move in Congress was a committee of the American Political Science Association which for four [illegible] of the [illegible] *ation of* [illegible] *e Asso* [illegible] *engthen* [illegible] National Planning Association

—and encountering numerous obstacles of a parliamentary nature, an omnibus bill incorporating the recommendations for a time had an uncertain prospect Clever handling of the measure, however, eventually brought it to a vote in both branches, and although the House of Representatives was responsible for deleting a number of good provisions, the amended bill became law as the Legislative Reorganization Act of 1946 [3]

The Act in operation

It so happened that before the new measure could take effect (in the Eightieth Congress, organized in January, 1947), the congressional and senatorial elections of 1946 sharply reversed the political complexion of both houses, and apprehension arose lest this result in the contemplated reorganization (especially of the committee system) being only partially or half heartedly carried out Notwithstanding lack of zeal in some quarters, however, the new Republican leadership affirmed its intention to give the reforms a fair trial, and while a limited number of provisions have proved abortive (for reasons not essentially partisan), the legislation has in general continued in full effect, under both Republican and Democratic regimes Practically every significant change introduced either has already been explained at appropriate points in preceding chapters *e g* the reconstruction of the committee system, or will be touched upon presently *e g* the regulation of lobbying, hence to avoid repetition, a general description is omitted here

All in all the reorganization accomplished was the most extensive that Congress has undergone at any given time in its history It stopped short, however, of changes which many people (including a good many senators and representatives) thought desirable, and before finally turning from the legislative branch, we may usefully summarize (1) some problems (by no means all) which that branch still presents, and (2) some proposals for improving its relations with the executive Where the legislation of 1946 has helped the fact will be pointed out

## SOME REMAINING DEFECTS IN CONGRESSIONAL STRUCTURE AND ORGANIZATION

1 Excessive size of the House of Representatives

To start with, the membership of the House of Representatives (435) is too large This is not as serious a drawback as some others, but it makes for congestion, confusion, and oligarchical domination, and it is generally agreed that something like 300 (first exceeded under the reapportionment of 1881) would be a figure more compatible with democratic and efficient conduct of legislative business Members of the House at present represent, on an average, six times as many constituents as in early days, [4] and, with adequate clerical and secretarial assistance (considerably increased in 1946), they could reasonably well represent twice as many as now Merely to hold the

[3] 60 *U S Stat at Large* 812
[4] About 60 000 in the First Congress and 350 000 under the apportionment of 1951

**2 Two-year term of representatives**

Another handicap is the short term of members of the House of Representatives. When the constitution was framed, it was the fashion to argue that "where annual elections end, tyranny begins", and the authors of *The Federalist* found it necessary to devote one of their papers to defending a term even as lengthy as two years.[5] Nowadays, many (including most congressmen) consider the term not too long, but too short. The average person elected to the House for the first time has no acquaintance with the prevailing methods of doing business, has had no legislative experience (except possibly in a state legislature or a city council), and has only a superficial knowledge of most matters with which Congress is called upon to deal. Elected for two years only, he cannot progress far toward becoming a useful member, much less a leader, before his mandate expires. Furthermore, a member, whether new or old, cannot get far into a two-year term without being obliged to turn his thoughts to reelection, particularly if he comes from a "close" district. This distracts his attention and divides his energies. Still another practical disadvantage is that while the two-year term provides a useful opportunity midway during a president's four years for a canvass and registration of popular opinion, in doing so it sometimes brings the House of Representatives under the control of a party opposed to the president (as in the second Wilson administration, the Hoover administration, and the first Truman administration), thereby tending to produce friction and paralyze action. A constitutional amendment fixing the term at four years has been introduced many times, but neither Congress nor the country ever has manifested sufficient interest to lead to any practical result.

**3 Traditional residence of a member in his district**

Although not a matter about which anything can be done legally, disadvantage arises, too, from the insistence of our politicians and people that a representative be a resident of the district for which he sits. In Britain, a man aspiring to enter Parliament, but finding no opportunity in his own district, "stands" in some other district, wherever there is an opening and the party authorities will accept him as a candidate, or a member, defeated in the district which he has represented, tries his luck in another and, if successful, goes ahead with his career. There is nothing in the national constitution or laws to prevent a person doing the same thing in the United States, save that he cannot, of course, represent any district outside of the state in which he lives, and there have been a few congressmen from New York and Chicago who dwelt in a section of the city not included in their respective districts.[6] In general, however, if a person were to seek election in a district in which he did not live, he would make little headway against the voters' conviction that only one of their own number can be trusted to look after their interests, or against the unwillingness of local politicians to see the office 'wasted' on an outsider. The results are sometimes unfortunate. Good men who happen to live in districts not dominated by their own party are cut off from any chance to serve the country in Congress, valuable members are forced to drop out

[5] No. LIII (Lodge's ed.), 333-339.

[6] When, however, in 1949 Franklin D. Roosevelt, Jr., decided to be a candidate (in a special election) in a New York City district in which he did not live, he promptly transferred his legal residence to it.

simply because defeated in their home constituency, and the pernicious concept is fostered of the congressman as merely the district's official agent—errand boy, one is tempted to say—for procuring appointments public buildings, and anything else that can be got when the plum-tree is shaken A somewhat higher average quality of members probably would result if this unfortunate parochialism in our political practice could be overcome

4 Limited use of joint committees

Perhaps the most important contribution of the Legislative Reorganization Act of 1946 was its simplification of the committee structure of the two houses The legislation's authors, however, focussed their attention almost entirely upon the houses singly, stopping short of any very serious consideration of the gains to be realized from a general scheme of joint committees Optional joint hearings of House and Senate committees, as a means of saving time and effort, were, it is true, authorized, also the preparation of "legislative budgets" in joint meetings of House and Senate committees having to do with revenue legislation and appropriations But no plan was offered under which, instead of duplicate committees on given subjects in the two houses unity and dispatch should as a general practice be sought through joint subject-matter committees, each having complete jurisdiction in an area like banking and currency, agriculture, or interstate and foreign commerce Massachusetts, Connecticut, and one or two other states derive distinct advantages from such committees, and while it does not follow that results on Capitol Hill would prove equally beneficial, full exploration of the possibility should be encouraged There now are, however, more joint standing and select committees than before 1946,[7] and more joint hearings of "twin" House and Senate committees are held

5 The seniority system

In connection with committees, there also is, of course, the perennial question of the seniority system As we have seen, there are arguments both for and against the prevailing practice Most students of the legislative process, however, agree not only that mere length of continuous service on a committee is no very logical basis for promotion to a chairmanship, but that sometimes the results are highly unfortunate The Joint Committee reporting the reorganization measure of 1946 could not, however, agree on any alternative plan, the legislation enacted was silent, and any solution remains for the future

## FUNCTIONAL AND PROCEDURAL SHORTCOMINGS

1 "Petty business"

Congress makes laws and controls funds for a country of continental dimensions, of great regional diversity, and of immense social and economical complexity, and more bills are introduced, more money raised and spent, and more measures enacted, than in the national legislature of any other land Moreover, many difficulties and problems on Capitol Hill spring, at least, in part, from the sheer bulk of business pressing for attention For a long time, the two houses have been justly criticized for permitting multitudes of bills adjusting claims, granting pensions, authorizing bridges over navigable

[7] For example on atomic energy, defense production the president's economic report internal revenue taxation and foreign economic cooperation

streams, and for other comparatively minor purposes, to clog their proceed ings and use up time better spent on more important things The Reorganization Act of 1946 considerably reduced the congressional work-load by transferring bridge building proposals to officials in the Department of the Army, pension claims to the Veterans Administration, and many (although by no means all) damage claims to specified administrative agencies or to the courts As indicated by a record of 1,052 private acts passed during the two years of a single recent Congress (the Eighty first), however, large loopholes for private legislation remain

District of Columbia affairs

Indeed, from a dozen to 20 days of every session in each house still are devoted to affairs of the District of Columbia—detailed matters of "petty business" often of a sort which in every city of the land except Washington is handled by the locally elected council The constitution, it is true, requires Congress to "exercise exclusive legislation in all cases whatsoever" over the area containing the seat of the national government Common sense would suggest that this be not construed so literally as to prevent turning over District legislative work to the existing commissioners or perhaps to a newly created council with merely a veto by Congress upon more important measures[8] The reorganization of 1946, however, made no move in this direction, but on the contrary left in the abridged committee lists of both houses a committee solely for the handling of District business

2 Parliamentary procedure—inadequacy of debate

When setting up their Joint Committee on the Organization of Congress in 1944 45, the two houses expressly withheld the right to recommend any changes in the parliamentary rules governing proceedings This was not because these rules stand in no need of improvement, but only because neither house wanted its ways of transacting business made a subject of inquiry and criticism by any agency even partly outside of its own membership No student of the legislative process can fail to perceive points at which congressional procedure could be bettered, indeed, many members of both houses would like to see changes made For such improvement, however, the country probably will have to await action by the houses singly, and this may be long delayed[9]

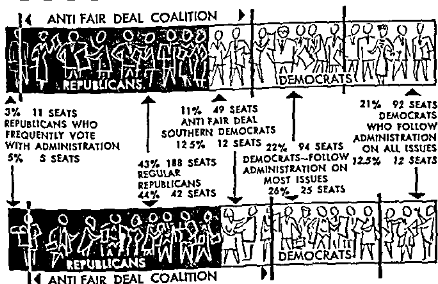
As matters stand, too much business is transacted—too many bills of deep concern to the people are passed—without the full debate that would familiarize members with what they are voting on and acquaint the country with the issues involved No doubt it is true that most work on important bills not only is, but must be, performed in the committee rooms When, however, measures of the magnitude of the Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938 can slip through the House of Representatives

[8] On the present government of the District see pp 566-567 below

[9] [illegible] Humphrey of [illegible]

below)

with only three hours and six hours respectively of discussion *on the floor* one is justified in believing that a basic purpose of wide popular representation *is failing* to be realized In the more leisurely Senate there is genuine debate (when not blocked by a filibuster) but the mechanized procedures of the overgrown and over regimented House have practically left that body without opportunity or incentive to debate large measures (except sometimes financial *bills*) in a large way and the fate of most important bills is predetermined by decisions and actions of the majority leaders with perhaps the aid of the majority caucus or conference and certainly the assistance of the rules com mittee Bills reported from a standing committee are explained briefly by the committee chairman and perhaps other majority members in an agreed order and minority members are given a chance to present their views But with rare exceptions no one expects votes to be changed by the arguments on either side The general run of members have not studied the measure they assume that the committee majority (or minority as the case may be) has gone into the matter and knows what it is talking about they hesitate to involve them selves in a discussion in which they might be worsted and still more to incur suspicion of party irregularity or disloyalty Accordingly they usually vote almost automatically to uphold their fellow partisans on the committee in pursuance of whatever program has been mapped out by the party leaders



Meanwhile, a great deal of time in every session is wasted in irregular and miscellaneous talk not directed to any definite legislative proposal

3 Deficiencies of party leadership and responsibility

Congress is an assemblage of politicians, by and large, if senators and representatives were not politicians they would not be on Capitol Hill They are party members, too, and both houses are organized and operated on a party basis To all this, there can be no objection In a democracy, the best political situation undoubtedly is one in which (a) rival parties (preferably two) contend for popular favor, (b) the one commanding a majority at any given time controls the policy-making branches of the government, (c) the party in power has a definite and positive program, (d) its leaders can hold the party rank and file in line, and (e) a responsible party leadership sees to it that majority will is translated into majority rule Conditions in the American Congress do not measure up to this standard, indeed, they fall far short of it. And the reason chiefly is that our parties are not adapted to the sort of *party government* presupposed Instead of being unified and cohesive, as British parties tend to be, our parties are mere patchworks of conflicting groups and interests—economic, sectional even ideological Instead of having integrated and centralized organization, they are loose-knit, largely state and local rather than national and devoid of commanding leadership, at least on the national level Venerable massive, even powerful, as viewed on the national landscape, in Congress they lose impressiveness Their members cannot be kept in line, under pressure from far smaller organized groups, they buckle and give way, their leaders and "managers —themselves often really only chiefs of groups, factions, or *blocs*—can maintain almost no discipline, party responsibility withers and at times becomes hardly more than a fiction Of partisanship there is plenty, but too frequently (especially when a congressional or presidential election is in the offing) expressing itself not in broad, two-sided debate of large issues, but in aimless bickering, sniping, distortion, delay, and futility

No fault of Congress is more fundamental or glaring, although what can be done about it no one has been able to figure out, since nothing short of a complete reorientation of American politics would meet the situation The Joint Committee of 1944-45 did, indeed attempt some contribution by offering a plan for a set of four well staffed "policy committees" [10] (one for the majority and one for the minority in each house), all appointed by the appropriate party caucus (or conference) at the opening of each new Congress, and all concerning themselves, within their respective spheres, with clarifying and unifying over all party legislative policy in terms of national well being rather than group and sectional interests In the House of Representatives, however, there was no response, [11] and while committees of the kind have for a few years been functioning in the Senate (where they perhaps are less needed), their effectiveness—except possibly on the minority Republican side after 1949 —remains to be demonstrated

[10] Not to be confused with the regular committees of the two houses

[11] Except that later on the Republicans gave their steering committee the name of policy committee

**4 The problem of lobbying**

If as is true the general public pays too little attention to what goes on in Congress there are those whose interest is unflagging Unhappily however these people often turn out to be men and women with an axe to grind—persons who want a constitutional amendment proposed or killed a statute passed defeated or amended a favorable or an unfavorable committee report made an appropriation voted or some other benefit conferred Hence another of the handicaps under which Congress works is the relentless and sometimes improper pressure brought to bear by these lobbyists —not as a rule persons seeking favors directly for themselves but rather professional paid agents [12] of special interests or organizations whose business it is to dog the footsteps of members and work unceasingly for whatever objects their clients have in view although a more refined technique now increasingly employed takes the form of grass roots lobbying *i e* prompting a congressman s constituents to flood him with letters and telegrams supporting and local newspapers to play up an objective sought

**(a) Magnitude of lobbyists operations**

It is not easy to say where the constitutional right of petition ends and lobbying begins Not all lobbying indeed is reprehensible either in object or in method There are lobbyists for the most worthy causes as for the least worthy and their activities may be entirely open and above board with desirable educational effects just as they may follow devious courses by dubious means toward mercenary or even corrupt ends The fact remains however that every congressman is an object of attention from men—increasing numbers of women too—bent upon influencing him by entreaty promise or threat to vote for or against this or that particular bill tariff schedule subsidy or privilege Upwards of 400 national organizations maintain a total of 800 to 1 000 liberally paid legislative agents permanently at the capital and many more are likely to be represented from time to time when measures affecting their interests are under consideration Scarcely an important bill passes without complaint arising in some quarter that an importunate and lavishly paid locust swarm of lobbyists has had a hand in enacting it and often as not the complaint is fully justified

**(b) The problem of regulation**

Lobbyists long have infested the state capitols no less than Washington and three fourths of the legislatures (beginning with that of Wisconsin in 1905) have enacted laws designed to place limits on their operations—usually by requiring persons engaged in lobbying to acknowledge the fact by registering with some designated official by forbidding the legislative floor to such persons and by requiring them to make their expense accounts a matter of public record In perhaps no more than half a dozen states however are such regulations consistently enforced and nowhere are they fully effective At Washington the matter long has received intermittent attention with the Senate from time to time sponsoring committee investigations and even passing bills requiring lobbyists to register and to reveal by whom they were employed

[12] Sometimes liberally paid ex-congressmen and ex senators (30 altogether in 1949) who retain the privilege of the floor in the respective houses and in general are presumed to know the most effective lines of approach.

and to what end In the lower house, however, such measures invariably perished, partly because of honest doubt (inspired to some extent by the not too impressive experience of the states) as to how effective any general attempt at regulation would prove, partly by the manifest difficulty of getting at and prohibiting improper practices without also interfering with legitimate ones, partly by the helpfulness attributed by many congressmen to the information and materials supplied to them by lobbyists, and partly, if the truth be told by the fear of many congressmen that any law enacted might place obstacles in the path of lobbying activities in which they themselves might want to engage after going out of office As a result, until 1946, federal regulation never went farther than to require public utility lobbyists to register, and workers in behalf of foreign interests and of shipping interests both to register and to place on record the nature and objects of their activities

(c) The Regulation of Lobbying Act of 1946

To anyone familiar with the maze of influences and pressures amidst which Congress works, it therefore must have come as an agreeable surprise when the Reorganization Act of 1946 was found to contain, as Title III, a Federal Regulation of Lobbying Act, poorly drafted yet definitely superior to anything previously on the books Like the main body of the statute, the lobbying section originated in the Senate, and its acceptance there was perhaps to be expected Reversing an earlier attitude, the House also, however, accepted it and in January, 1947, its provisions went into effect The salient features of the new regulations (applying to lobbying by every sort of interest on every sort of subject [13]) are

1 Every person receiving any form of compensation for attempting to influence the passage or defeat of any legislation by Congress must, before he begins operations, register with the clerk of the House and secretary of the Senate [13a]

2 In doing this, he must disclose by whom he is employed, in whose interest he works and how much and by whom he is paid and for how long both as salary and for expenses

3 Every three months he must report in detail and under oath all monies received and the ways in which they have been spent

4 Every person soliciting or receiving contributions to any organization or fund for lobbying purposes must keep an exact account of all contributions received the name and address of every contributor of as much as $500, all expenditures made by or on behalf of such organization or fund, and the name and address of every person to whom money has been paid

5 Full and detailed reports covering these matters must be filed yearly with the House and Senate officials mentioned and for two years must be kept open for public inspection [14]

[13] But defined to exclude appearance before a congressional committee activities by any news

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Violators of any of these provisions are liable to a fine of $5,000 or imprisonment for a year, or both and are debarred from further congressional lobbying activities for a period of three years after conviction

It would be gratifying to be able to record that the foregoing legislation has solved the lobbying problem but no such claim can be made Whether or not any one expected lobbyist pressures to be lessened, there certainly has been no such result, never were the real estate lobby, the wool lobby, the sugar lobby, and long lists of others more active and persistent than during the very first year of the new law s operation and lobbying expenditures are reported to have risen from $5 million in 1947 to more than $8 million in 1950 (in behalf of 304 different groups and organizations) [14a] The best that can be said is that lobbyists and the influences behind them have been forced more into the open, and that is a clear gain But mere outward compliance with the rules—even if insured by more adequate enforcing machinery than exists—does not necessarily render lobbying activities less predatory, after all, the present law merely seeks publicity for lobbying activities, without trying to control their objectives or methods, and it is difficult to see how evils can be eliminated except as Congress finds ways to stiffen members' resistance, *e g* by making them less dependent upon the biased information with which the lobbyist now too often overwhelms them The pressure group is an unavoidable, and within limits entirely proper, element in democratic government The problem is to keep its influence in proper balance and perspective

*(d)* Results

## THE IMPROVEMENT OF LEGISLATIVE-EXECUTIVE RELATIONS

Important as is the further reform of Congress, an even greater need is for improvement of the relations between the legislative and executive branches By no one's planning, but by the logic of practical experience and necessity, these relations have grown far more numerous and complex than the makers of the constitution anticipated Under our system of separated powers, they continue, however, to be relations between two distinct, rival, and sometimes hostile authorities, Congress and president, occupying ' two islands of separate and jealous power', and hence they often produce delays, deadlocks, weak compromises, and divided responsibility Perhaps these disagreeable consequences are the price we have to pay for a basic safeguard which most people still consider a virtue of our constitutional system But often they are impediments to smooth operation of the government, and much thought has been devoted to methods of obviating, or at least curtailing, them

Proposal for adoption of a cabinet system

Of course, the boldest way of seeking harmony and unity between Congress and the executive would be to abandon our historic principle of separation of powers and frankly go over to a cabinet system like the British This done, the president would become a mere titular chief executive, with only formal and ceremonial functions The actual operating head of the government would

[14a] The reported totals for the first session of the 82nd Congress which ended in October, 1951 are somewhat lower than those for 1950

become the cabinet, drawn from the membership of Congress and simultaneously supervising administration, framing policy, and leading in legislation Functioning under full individual and collective responsibility to Congress, a cabinet losing majority support in that body would give way to another—unless convinced that it was Congress that had got out of step with the national need and temper, in which event a dissolution might be ordered and harmony sought through new elections This, it seems, should be a way of largely obviating the tension, friction, and futility now too often characterizing legislative executive relations in Washington, and interesting books have been written advocating the plan or something approaching it The proposal has only to be mentioned, however, to be dismissed as, for the foreseeable future, visionary No informed observer really supposes that our people are prepared for so momentous a step, and even if they were, it does not follow that cabinet government would work as well here as in the land of its birth [15]

Other proposals

Might it not, however, be possible, while retaining our traditional presidential system, to modify it in such a way as nevertheless to yield some of the advantages inherent in cabinet government? Some persons think so, and a few of their proposals deserve mention

1 Floor privileges for cabinet members

Perhaps the mildest suggestion is that, with the president continuing to appear before Congress only, as now, to present messages, the heads of executive departments be extended the privilege of the floor in both houses for the purpose of giving information, answering questions, and engaging in debate, although of course without voting Already cabinet officials are seen mingling with senators and representatives in the corridors and cloakrooms of the Capitol, with increasing frequency, too, they appear before congressional committees Would it not be advantageous, it is asked, to give the entire membership of either house, or both, a chance to hear what they have to say and to question them in the same direct manner in which ministers are interrogated during the periodic "question hour" in the British House of Commons? The plan has attractiveness and lies easily within the present power of both houses to admit such persons to the floor as they choose, and to the objection that legislative business would be slowed up by minority, or "opposition," members plying the Administration's spokesmen with questions provocative of debate, it manifestly can be replied that it is precisely such questioning and debate that give the cabinet system in Great Britain one of its principal claims to distinction [16]

Carrying the idea farther, Presidents Taft and Wilson favored a plan under which, when selecting department heads, the chief executive would take most or all of them from among senators and representatives, the persons chosen, however, retaining their seats in the respective houses and thus to a degree assuming the legislative-executive rôle characteristic of cabinet members in Great Britain. Undoubtedly, surrounding the president with department chiefs dividing their time between managing their departments and sitting as members of the House or Senate would bring the executive and legislative branches closer together. It even would be a step in the direction of a cabinet system. The result, however, would by no means be such a system, for the actual operating executive (the president) still would be outside of the legislature and constitutionally as independent as now. How much gain such a hybrid arrangement would yield is problematical. A constitutional amendment, too, would be required, since heads of departments, as civil officers of the United States, are at present ineligible to membership in Congress.

2. A cabinet of congressional members

Several students of the legislative-executive problem have suggested leaving existing arrangements as they are except for superimposing upon them (without touching the constitution) some sort of a council designed to be of service in promoting unity of planning and action. We have had a proposal that the chairmen of standing committees in the two houses (with committees reduced in each house to perhaps nine) be formed into a "legislative" or "congressional" cabinet, with responsibility for coordinating programs of legislation and meeting frequently with the president for developing broad lines of public policy.[17] We have had the suggestion that a bipartisan "joint legislative council" consisting of 11 senators and 11 representatives (committee chairmen or other leaders), with three additional members appointed by the president, serve as a central legislative steering committee through which all proposed legislation would be routed, and as an agency for systematic consultation between Congress and the president.[18] We have had a plan for a congressional cabinet to consist of the chairman of perhaps nine joint Senate-House committees (superseding present separate committees of the two houses), and combined with an equal number of members of the executive cabinet in a joint executive-legislative cabinet, to serve as a bridge between the two branches and link them in harmonious action.[19] And more recently, as mentioned above, the Joint Committee on the Organization of Congress put forward a plan for four "policy committees" (one for the majority and one for the minority in each house), each consisting of seven members appointed by the appropriate party caucus (or conference), all concerning themselves within their respective spheres with formulating over-all party legislative policy, and the two majority committees acting, in addition, as a council to meet regularly with the president and members of the executive cabinet to facilitate the formulation and execution of national policy and to improve relations between the executive and legislative branches—a plan promising

3. A legislative-executive council

[17] R. Young, *This Is Congress* (New York, 1943), Chap. VIII.

[18] A. Hehmeyer, *Time For Change* (New York, 1943), Chap. IX.

[19] T. K. Finletter, *Can Representative Government Do the Job?* (New York, 1945), Chap. XI. Cf. E. S. Corwin, *The President: Office and Powers* (3rd ed.), 361-364.

genuine advantages, but thus far abortive because of failure of the House to set up the required two committees

The outlook

At the date of writing (1951), the prospect for adoption of any of the several proposals reviewed is not particularly bright Everyone agrees that, under our system of government, there are few if any matters of greater importance than the working relations between the legislative and executive branches, nearly everyone concedes that the proper objective is not the further building up of two separate and powerful authorities, confronting and battling each other, but rather the development of two complementary and interlocked agencies capable of serving the interests of the country through common consultation, planning, and action At present, the most promising means of promoting such a relationship would seem to be a mediating legislative-executive council of one or another of the several types suggested, perhaps preferably the kind of a council envisaged by the Joint Committee [20]

Since World War II, Congress, however, has emerged, with a deep sense of satisfaction, and even exultation, from a decade or more of unprecedented executive domination During four or five years—including two years of Republican majorities, but with tension at times almost as great under Democratic domination—its relations with the White House have been strained It surprised, and in a sense over-exerted, itself in adopting the partial reorganization of 1946 And, all in all, it now is hardly in a mood either to undertake further overhauling of its own machinery and procedures or to enter into new "entangling alliances" with the executive Sooner or later, further congressional reform, and also measures to put legislative executive relations on a more rational and salutary basis, probably will be undertaken But for the present such advances lie in the uncertain future, with the circumstances and forces prompting them remaining to be disclosed

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## CHAPTER 19

# The Office of President—The Cabinet

Without overstatement, the president often is termed our chief legislator After all, however, his principal rôle is that of an executive, in him, indeed, the constitution tersely vests "the executive power" And in turning from the primary policy-making branch of our government to the branch responsible for carrying policy into effect, we naturally start with the most conspicuous official, the chief executive

### PRESIDENTIAL TERM, QUALIFICATIONS, AND EMOLUMENTS

Term and re eligibility

One of the consequences of a presidential system like ours is a fixed term of office for the chief executive, and although a few members of the Philadelphia convention were willing that the president should hold office during good behavior, the question narrowed down to (1) a seven-year term without eligibility for reelection or (2) a four year term with no such restriction At one stage, the seven-year plan was approved But when it became clear that the president would not be chosen by Congress, the main objection to re-eligibility disappeared, and the briefer term, without restriction as to reelection, was substituted In the course of time, it became a tradition that a president should not have more than two terms The only presidents in a century and a half who undoubtedly could have had a third term, *e g*, Washington, Jefferson, and Jackson, refused to seek one, and two who tried for one, *i e*, Grant and Theodore Roosevelt, failed of their objective

In 1940, however, the unexpected happened With war raging in Europe and the Far East, and with the United States itself confronted with graver dangers than at any time since Civil War days, President Franklin D Roosevelt took the view that continuity of presidential experience and leadership was indispensable to the country's security, and accordingly sought and won reelection to a third term Four years later, with the nation straining every sinew in a global conflict, and enmeshed in a multitude of operations and commitments with the emerging United Nations the argument seemed even stronger, and the upshot was reelection to a fourth term also—although the worn and ailing executive lived to serve not quite three months of it

Believing that a president eligible for reelection hardly can escape temptation to make appointments, use the veto power, and otherwise shape his

course with an eye to continuance in office, persons throughout the past have considered that it would be better if there were no reeligibility to even a second term, and from as early as 1828 it now and then was proposed, in Congress and outside, that the constitution be amended to provide for a term of six years rather than four, but with no reelection—an alternative plan more frequently suggested in later times being that two four-year terms be made the maximum Third- and fourth term elections in 1940 and 1944 naturally brought the subject sharply to the fore, and in 1947 a Republican Congress placed before the states a constitutional amendment forbidding any person to be elected to the presidency more than twice, although making eligible for a second election any one who had occupied the office not more than two years while filling out an unexpired term [1] Ratifications proceeded rapidly in 1947, lagged during the next three years, but early in 1951 reached the required 36, and under the resulting Twenty second Amendment, maximum presidential tenure now is two and one half terms, *i e*, 10 years Aside from the charge that the amendment was a slur on the memory of a deceased president, the principal objection raised was that under it the country might at some future time be involuntarily deprived of the leadership of an able president when most needed [2]

Tenure restricted by the Twenty second Amendment

Whatever additional qualifications a president may be expected to have, he must meet three tests expressly imposed by the constitution (1) he must be at least 35 years of age, (2) he must have been a resident of the United States for at least 14 years (not necessarily consecutive), and (3) he must be a 'natural-born citizen Inasmuch as the vice president may at any time be called upon to take up the duties of the presidency, he too must have all of the qualifications required for that office

Presidential qualifications

Benjamin Franklin argued in the Philadelphia convention that, since wealth and power are the corrupting allurements which human nature finds it hardest to resist, the president should be allowed nothing whatever from the public treasury beyond his expenses But though the famous Pennsylvanian had the reputation of being the wisest man of his day, his proposal was not even put to a vote, and by constitutional provision the president receives a salary, with the safeguard that it may be neither increased nor diminished during the period for which he has been elected He is forbidden to receive any other emolument, either from the United States or from any state But this is construed not to prevent the United States from providing him with a dignified colonial mansion (the White House), a suite of offices, a secretariat, a yacht, a private Pullman car, an airplane, a fleet of automobiles, $40,000 a year for

Salary and allowances

[1] The [illegible] when the amendment was submitted *i.e* President Truman, was expressly [illegible]

travel and entertainment, and a rather liberal expense allowance raised in 1949 to $50,000 Originally fixed at $25,000 annually, the president's salary was increased in 1873 to $50,000, in 1909 to $75,000, and in 1949 to $100 000 (worth about $60,000 after income taxes at recent rates are paid) The cash emolument—long insufficient to meet a president's needs—is now generous but still below that received by many business executives and other persons in private life

## PRESIDENTIAL BURDENS AND PROVISIONS FOR ASSISTANCE

The president at work

Some presidents put in longer hours and work harder than others, but for none is the office a sinecure, few, even though not yet old, are as fit when they leave the White House as when they entered it There is, first of all, a vast amount of administrative routine Much, of course, can be turned over to subordinates, but much also is of such a nature that the president cannot escape it The daily grist of correspondence is exacting and time-consuming[5] Heads of departments, members of Congress, party leaders, representatives of business, labor, and agriculture, and a wide variety of other people must be given personal interviews Delegations, official and unofficial, must be welcomed State receptions and dinners must be held Appointments to public office make heavy demands When Congress is in session, there are bills to be studied, programs of legislation to be mapped out, innumerable conferences to be held, and even during legislative recesses, much may need to be done for the furtherance of legislative projects which the chief executive has at heart Foreign relations call for much—in periods of stress like the past decade, almost constant—attention Even with the spadework done by other officials or by "ghost writers," preparation of messages and of public addresses helps chain the president to his desk, cabinet meetings, official entertainment of foreign and other guests, press conferences, radio talks, and participation in public ceremonies take their toll of energy and time And as if all this were not enough, the president is expected to exercise a general watchfulness over the state of the country and at times of crisis—such as the stock-market crash of 1929, the great droughts of 1930 and 1934, the banking *débâcle* of 1933, and the paralyzing strikes of 1946—to devise, guide, and lead in carrying out measures of relief and remedy, in time of war, the load assumes staggering proportions The presidency, declared the pitifully broken Woodrow Wilson when leaving it in 1921, is too great a burden for any man

The Executive Office of the President

Of course, some provision long has been made for assistance Until fairly recently, however, it was inadequate, and it is gratifying to observe, not only that a special staff of not to exceed six administrative assistants has been added to aid with personnel matters and publicity, and in dealings with Congress and the executive departments and other agencies, but that under

[5] Letters hauled up to the White House in post office trucks ordinarily number from 1 000 to 3 000 a day *Only an infinitesimal proportion ever reach the president personally* but all are opened and disposed of through one channel or another Their chief value is as a gauge of public opinion

powers conferred by a Reorganization Act of 1939, multifold and vital managerial activities have been correlated under presidential direction in the Executive Office of the President, in divisions or branches shifted from time to time, but of late embracing as principal units

1 The White House Office including the now three presidential secretaries the now five administrative assistants an executive clerk, and two or three miscellaneous attaches, and serving the president in the performance of the many detailed duties incident to his daily routine

2 The Bureau of the Budget charged not only with drawing up the annual budget, but with watching over its execution and with the improvement of management planning and statistical services throughout the entire national administration

3 The Liaison Office for Personnel Management, assisting the president in his contacts with all agencies dealing with personnel matters

4 The three man Council of Economic Advisers created under terms of the Employment Act of 1946 and charged with keeping an eye on the national economy, advising the president concerning it and helping him prepare reports on it for submission to Congress

5 The National Security Council established by the National Security Act of 1947 to advise the president on the integration of domestic, foreign, and military policies relating to national defense

6 The National Security Resources Board also established by the National Security Act and charged with advising the president on the coordination of military industrial and civilian mobilization in the event of war

7 The Office of Defense Mobilization created late in 1950 to coordinate and direct all mobilization activities of the executive branch of the government, at least during the emergency associated with resistance to Communist aggression

## THE VICE-PRESIDENCY AND ARRANGEMENTS FOR PRESIDENTIAL SUCCESSION

Since presidential elections take place only at regular four year intervals, some arrangement is necessary for filling out a term in case the president dies, resigns, or is removed by impeachment, and the constitution provides for a vice-president, who is to take up the duties of president whenever the office falls vacant or the president is himself unable to discharge them No president has resigned, none has been removed, although the impeachment proceedings against Andrew Johnson failed by a single vote, and no president has been incapacitated to such an extent or for so long a period as to lead to the assumption of presidential functions by the vice-president, although such a transfer of authority was seriously discussed after the wounding of President Garfield by an assassin's bullet in 1881, and also during the earlier stages of President Wilson's illness in 1919 20 [4] Seven presidents, however, have died in office, and a like number of vice presidents have in consequence assumed

the duties of the presidency [5] Since Van Buren, no vice-president has been elected president unless he had first been elevated to the office by the death of the incumbent

The vice president's share in the work of government

Unless an emergency makes it necessary for him to assume the powers and duties of president, the vice-president has no constitutional function except to preside over the Senate even there he is not a member and has no vote except in the case of a tie In form, he is an executive officer, with, however, as such, only potential, rather than actual, powers and functions But he may at any moment be called upon to take the helm of the government, and it goes without saying that he will do well to keep informed on the state of public affairs and on the policies and plans of the Administration From the vantage point of the presiding officer's chair in the Senate, he will, of course, learn much of what is going on in legislative circles He needs also, however, to be in close touch with the executive side of the government, and an obvious means to this end is attendance at meetings of the cabinet Somewhat curiously, nevertheless Calvin Coolidge was the first vice-president in the country's history to sit with the cabinet with any regularity—although the practice has been fairly general since his time [6]

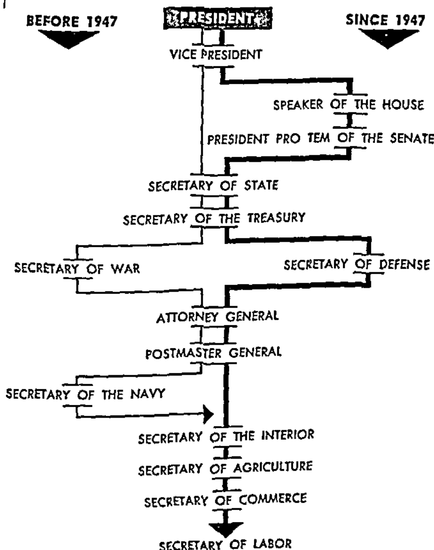
Further provisions for succession

If occasion arises, the duties of the presidency devolve upon the vice-president But, obviously there is no guarantee that at any given moment there will be a vice-president, that official may himself have died, resigned (as did Calhoun in 1832), been removed, or become incapable of attending to public business Moreover, after a vice-president has assumed the presidency, there would be no one—unless further arrangements were made—to step into the highest office should it again fall vacant in mid term Accordingly, the constitution empowers Congress to provide for the case of removal, death, resignation, or inability of both the president and vice president, "declaring what officer shall then act as president" [7] The first legislation on the subject, dating from 1792, provided that the president *pro tempore* of the Senate should succeed or in case of no such official being available, the speaker of the House of Representatives This plan was open to various objections, but not until 1886 was a new one substituted under which, after the vice-president, the heads of the seven executive departments then existing were to succeed, in a sequence specified in the law, and beginning with the secretary of state—due regard being paid of course, to the constitutional qualifications of age, citizenship, and residence

The main thing to be said for the original scheme was that it would bring to the presidency no one who was not at least an *elective* official, and in 1945

President Truman, disturbed by a situation in which (the vice presidency being vacant) he, in appointing a secretary of state, would in effect be naming his successor in the event of his own death or incapacitation, began urging Congress to amend the law of 1886 so as (1) to provide (with both the presidency and vice-presidency vacant) for election of a president, in the customary manner, to fill out an unexpired term, and (2) to designate the speaker as successor during the interval, after him the president *pro tempore* of the Senate, and only when that point was reached, the heads of departments in specified order With no vice president available, the speaker, it was plaus-

The Presidential Succession Act of 1947



ibly argued, was the most logical interim successor, considering that he would have been elected to Congress by the voters of his district and chosen as speaker by the majority party in the House—the same party, as a rule, to which the late president and vice-president would have belonged. Objections were raised—among them doubt as to whether either the speaker or the president *pro tempore* is an "officer of the United States," which, according to the constitution, any successor must be, and only the President's persistence over a period of more than two years, combined with the circumstance that, with the Republicans in control of Congress after 1946, the succession would (for the moment at least) devolve upon members of their party, availed to induce action. In 1947, however, a new Presidential Succession Act [8] was at last adopted, putting the speaker first in line of succession (after the vice-president, of course, if there be one), the Senate's president *pro tempore* next, and heads of departments (starting with the secretary of state) last—with, however, no provision for any election for filling out an unexpired term. And, whether constitutional or not, this is now the law on this troublesome subject. Never as yet, of course, has the succession actually passed beyond the vice-president.

## THE CABINET

The early question of an advisory council

When, in 1781, our first national executive departments were set in operation by the Congress of the Confederation, it was suggested that the heads of the four establishments provided for be associated in a council to advise Congress, and in the convention of 1787 several plans for a council—a council of appointment, a council of revision, or a general "council of state"—were given some thought. No proposal on the subject, however, was adopted, and it remained after the constitution went into effect, for an informal advisory group, consisting of the heads of the then only three departments, to form around the president, not in response to any constitutional or statutory provision, but as a mere matter of convenience and usage. To this day, the "cabinet," as such, is quite unknown to the formal constitution and is recognized only casually in the statutes; if any president were to make bold to dispense with it altogether (as one or two have in effect done for brief periods), not a constitutional or legal question could be raised concerning his right to do so.

Varying relations with the president

Throughout the years, the cabinet has remained what it was at the outset—a purely advisory body. The president can make much use of it, or little, or none at all, as he chooses. Looking upon the heads of departments as mere administrative officers, and preferring the advice of his personal friends, official and otherwise, Jackson early discontinued cabinet meetings altogether, and some other presidents, *e.g.*, Grant, much of the time Wilson, and in his first years Franklin D. Roosevelt, have leaned but lightly on their cabinet advisers. On the other hand, certain presidents, *e.g.*, Pierce and Harding, have consulted their cabinets at every turn and usually have followed the advice received. An able cabinet can go far toward making up for the deficiencies of a weak president, and can lend added strength to a strong one. A president may,

[8] *61 U. S. Stat. at Large* 380.

however, find that he has made a mistake in selecting a given cabinet member, or friction may develop leading to a resignation or even a dismissal, for department heads have no fixed term and can be dropped at any time

**Meetings and influence**

Nowadays, the cabinet meets ordinarily once a week (except during vacation and sometimes campaign periods and when the president is out of town), although usually oftener in times of war or other stress Ranging widely over problems and policies of the Administration (not omitting their party aspects), discussions are directed mainly to matters large or small, which the president himself introduces, although others may be brought up—usually with consent secured in advance—by the department chiefs, or even by other officials sometimes attending Proceedings are decidedly informal There are no rules of debate, free interchange of opinion takes place in a conversational manner, only rarely is there a vote, and no minutes or other official records are kept Furthermore, such decisions as are reached are mere recommendations Just as the president is free to submit or not submit a matter for consideration, so is he free to make any final disposition of it that he likes Ordinarily, he will be influenced by the views of the men whom he has chosen to be his official advisers But if he thinks their advice not sound, he is under no compulsion to follow it It is he, not they who will have to bear ultimate *responsibility before the country for whatever is done or not done* 'Seven nays, one aye—the ayes have it, announced Lincoln, following a cabinet consultation in which he found every member against him Cabinet discussions bring out useful information and opinion, clarify views, and promote morale in the Administration They help the president pick his course in both international and domestic affairs But they do not culminate in decisions upon policy by mere show of hands [9]

**The selection of members**

**1 Party status**

Department heads—that is to say, cabinet members—are selected with both their administrative and advisory functions in mind Several other considerations, however, usually influence decisions First, the persons named must normally be of the president s party *Washington made Jefferson secretary* of state and Hamilton secretary of the treasury But friction arose, and soon it proved desirable to bring the chief offices into the hands of men who saw eye to eye in political matters Since 1795, the principle of party solidarity has been adhered to rather closely Cleveland, it is true, appointed as secretary of state a man who had been thought of as a Republican candidate for the presidency But the appointee (Walter Q Gresham) had supported Cleveland in his electoral campaign McKinley appointed a 'gold' Democrat secretary of the treasury, Theodore Roosevelt and Taft each appointed a Democrat secretary of war, Hoover made a Democrat attorney-general But in all of [illegible]

[illegible]

[illegible]
(Frank Knox) at the same time made secretary of the navy had only four

[9] No president of course relies upon his cabinet alone for advice Members of Congress, old friends and associates bankers, business men labor leaders, experts on social and economic problems—these are only a few of the people who often will be seen wending their way to the White House either by invitation or on their own initiative

years previously been his party's candidate for vice-president Regard for party affiliation does not mean, however, that only party leaders are appointed The tendency to look upon the cabinet as a council of party leaders has largely come to an end Appointees normally belong to the party in power at the White House, but as a rule half or more of them are not party leaders in any proper sense of the term, and some have taken no active part in politics at all [10]

2 Other factors

Other practical considerations more or less influencing the president's selection are geographical distribution, representation of various wings or factions of the party, and obligations incurred for political support It will not do to take all of the cabinet officers from the East, or from the West, or from any other single section of the country Appointment of representatives of different elements in the president's party is designed, of course, to conciliate opposition and promote solidarity A good illustration is President Wilson's appointment of William Jennings Bryan as secretary of state in 1913, aimed at winning for the Administration the support of the more radical wing of the Democratic party Selections frequently must be made, too, with a view to rewarding individuals (or groups behind them) who have aided conspicuously in the president's election Still another contributing factor is personal friendship and favor Every president takes into his official family men whom he knows but slightly, but he is likely to include also one or two who, whatever other claims they may have, are first of all personal friends All told, however, probably an increasing proportion of cabinet officers are chosen for their special knowledge and experience or their administrative ability, proved or presumed Frequently, they are persons who have attained eminence in the professional or business world The secretary of the treasury is very likely to be of this type, as, for example, William G McAdoo and Andrew W Mellon, the secretaries of commerce and agriculture also, as in the instances of Herbert Hoover, David F Houston, and Henry A Wallace, and perhaps one may add the secretary of labor, as in the case of the first woman to receive a cabinet appointment, Frances Perkins The attorney general is at least always a lawyer Rarely is a member encountered, however, who has ever had any connection with the work of the department over which he is called to preside, [11] and, contrary to earlier practice, few heads of departments now are carried over from a predecessor's cabinet circle, even when the new president is of the same party [12] For the experience, as well as the technical competence, essential to satisfactory performance of its work, a department is dependent mainly upon subordinate officers who do not come and go with changes at the White House

[10] On the other hand of course members are occasionally chosen mainly or solely because of their services as party leaders or officers It has indeed become almost traditional for the chairman of a national party committee to turn up as postmaster general in the cabinet of a president whom he has helped to elect In 1949 the Hoover Commission recommended that in any event the postmaster general be barred from simultaneously holding any official position in

[illegible] position

[illegible] continues

[illegible] ruman lost

little time in making a number of changes

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# CHAPTER 20

# The President as Chief Executive

## SOURCES AND SCOPE OF EXECUTIVE POWER

*Sources*

Whatever else he may be—"chief legislator," party leader, general custodian of national interests—the president is first of all an executive, and functions in this capacity come to him from two prolific sources (1) constitutional clauses directly conferring them, and (2) acts of Congress either making specific executive actions mandatory, or, more often, delegating discretion in interpreting and applying statutory authorizations

*The question of inherent power*

A question which has stirred considerable difference of opinion, even among presidents themselves, is that of whether the president has inherent, as well as conferred, executive power That is, has he power, outside of the constitution and laws, simply because he is the chief executive? Alexander Hamilton and Andrew Jackson thought so, on one occasion, the Supreme Court inclined to the same view,[1] and Theodore Roosevelt, after retiring from office, recorded that as president he had 'insisted upon the theory that the executive power was limited only by specific restrictions and prohibitions ," and that he had "declined to adopt the view that what was imperatively necessary for the nation could not be done by the president unless he could find some specific authorization to do it"[2] The topmost characteristic of our national government is, however, that it is a government of limited powers—of only such powers as are delegated in the constitution or can properly be inferred from that instrument—which clearly means that no executive power (or, for that matter, power of any other kind) is inherent, in the sense of antedating and transcending the constitution "The true view of the executive function is, as I conceive it,' wrote President Taft, 'that the president can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise Such specific grant must be either in the constitution or in an act of Congress passed in pursuance thereof There is no undefined residuum of power which he can exercise

[1] *In re* Neagle 135 U S 1 (1890) The question was whether in the absence of any law ... iarshal as bodyguard ... e Court found such

because it seems to him to be in the public interest '[3] President Roosevelt was politically minded, President Taft legally minded, and the view of the latter seems clearly the more correct—even though most of the time in the past the Supreme Court has been willing to allow the president very wide latitude in interpreting his constitutional powers and in so doing sometimes has seemed to recognize the chief executive as having 'inherent' powers[4]

*Presidential powers classified*

Important functions fall to the president more or less as by products of his constitutional position—for example, the leadership of his party Strictly as president, however, and *on the basis of the constitution and laws*, he has powers and functions of two main sorts (1) those associated with legislation and (2) those by nature executive In turn, executive powers fall into six main groups (1) enforcement of the laws and maintenance of domestic order, (2) appointment and removal of civil and military officers, (3) supreme direction of administration including issuing orders and regulations, (4) pardon, reprieve, and amnesty, (5) management of foreign relations, and (6) control, as commander in chief of the military and naval establishments, together with the conduct of war The last two of these will necessarily be dealt with in later chapters devoted to foreign relations and defense, the other four must engage our attention here

## ENFORCEMENT OF THE LAWS AND PRESERVATION OF ORDER

*I Execution of the laws*

The most solemn obligation laid upon the president by the constitution is to "take care that the laws be faithfully executed ' His oath of office obligates him to ' protect and defend the highest law of all *i e* the constitution, and by implication the entire system of constitutional government resting upon it, including all federally guaranteed popular rights and liberties By logical deduction, too, his function extends to protecting all federal instrumentalities and property

*Available facilities*

For discharging this lofty responsibility he has ample facilities—first of all, the vast array of over two million federal officials and employees engaged in carrying on the day to day activities of the departments and other agencies, and afterwards, in so far as its services may be needed, a particular branch of the executive establishment having as its main, although exclusive, purpose the over all enforcement of law where something more than routine operations of other agencies are required This special machinery of law en forcement consists, of course, of the Department of Justice, with a staff in Washington headed by the attorney general, and with a field organization

k 1916), 139 14?

embracing principally the district attorneys and marshals and their deputies Not even all of this, however, exhausts the chief executive's law-enforcing resources, because he has the help also of the courts, and, if need arises, may make use of the Army, and likewise of the National Guard when called into federal service "The entire strength of the nation," the Supreme Court has said, "may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws"[5]

2 Repression of domestic disorder

As we have seen, the constitution specifies that the United States shall guarantee to every state a republican form of government and shall protect the states against both invasion and domestic violence If the republican form of government in a state is threatened or danger of an invasion arises, the president may act without awaiting any request from the state authorities If however, the situation involves merely domestic disorder, he cannot act until he is asked to do so unless the execution of national law, the carrying on of a national activity, the safety of national property, or the flow of interstate commerce is imperiled, in any of these contingencies, he may intervene independently, as did President Cleveland, over the protest of Governor Altgeld of Illinois, when, in 1894, the carrying of the mails and the flow of interstate commerce were obstructed by the Pullman strike at Chicago A request for national assistance in repressing domestic violence is made by the legislatures of the state if it is in session, otherwise by the governor The president, however, is under no compulsion to comply, indeed, he is not likely to do so unless, after investigation, he finds federal interests endangered or considers that the authorities of the state have reached the limit of their capacity to handle the situation

## APPOINTMENT AND REMOVAL

Only two officers of the United States are elected by the people, *i e*, the president and the vice president[6] All others are appointed In general, the power to appoint is vested in the president, and no authority intrusted to him is, year in and year out, of greater practical importance With it goes not only control over administration, but also considerable influence upon legislation through appeasement of senators and representatives seeking places for their constituents A president's appointments may go far toward making or breaking him as head both of the government and of his party

Scope of the presidential appointing power

In the constitution, we read that Congress "may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments",[7] and this has opened a way for relieving the president of the impossible burden of selecting the great mass

[5] *In re* Debs 158 U S 564 (1895)
[6] Members of Congress are not national officers
[7] Art II § 2 cl 2

of men and women nowadays on the federal payroll. The constitution, it is true, neither defines the term "officer" nor indicates who are to be considered "inferior" officers. It does specify ambassadors, other public ministers or consuls, and judges of the Supreme Court as officers who are to be appointed by the president and Senate. But aside from this brief list, it leaves Congress free to indicate who are "inferior" officers and to assign the appointment of such to the president acting independently, to the courts, or to heads of departments—all not thus allotted being presumed, as superior officers, to be appointed only by the president and Senate. The congressional power indicated has been exercised repeatedly; indeed whenever Congress establishes a new position or class of positions, it fixes its status by prescribing how appointments shall be made—whether by the president and Senate or in some other way. A limited number of appointments have been intrusted to the president independently, the courts have been given authority to choose their clerks and other staff members, and as for the host of lesser officers and employees comprising the nation-wide civil service, the heads of departments (or of other establishments) have been given the appointing power, limited only by the competitive examination system now widely prevailing.

How far this dispersion has gone is indicated by the fact that, in a total federal civil personnel of 2,529,900 (at the end of Sept., 1951), only a few thousand—presumed to be superior officers—are put in their positions by the president and Senate.[8] Included in the number, however, are not only top-level policy-determining officials whom it is altogether proper that the president select, but sizable groups like district attorneys and marshals and collectors of customs and internal revenue which could readily be treated as "inferior" and provided for in some other way, relieving the hard-pressed chief executive of one of his greatest burdens without in any degree detracting from his effective headship of the administrative system.[8a] The number of presidentially appointed officials might wisely be reduced to perhaps two or three hundred.

Limitations under which the power is exercised

Important as the president's appointing power unquestionably is, within the range indicated, it is hedged about with restrictions, some legal, others arising simply out of practical conditions. To begin with, by constitutional provision the chief executive appoints, not independently (except in a few instances as indicated above), but "by and with the advice and consent of the senate"; to speak with entire accuracy, he *nominates*, the Senate *confirms* (by a majority vote of the members present), and he thereupon *appoints*. As Hamilton explained in *The Federalist*, this procedure was adopted, not to lessen the president's responsibility for appointments, but to curb any spirit of favoritism that he might manifest and "to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity."[9]

1. Advice and consent of the Senate

[8] Exclusive of almost 22,000 first-, second-, and third-class postmasters, appointed under special arrangements. See p. 327, note 8, below.

[8a] During 1951, for example, President Truman asked Senatorial confirmation of 2,847 appointments to civilian posts.

[9] No. LXXVI (Lodge's ed.), 474.

From the earliest days, it has been customary for the Senate to assent almost as a matter of course to the president's selections for the highest positions in the executive departments Heads of departments serve, at least ostensibly, as his principal advisers, besides, as chief of the executive branch, he bears full responsibility for their official acts On both grounds, it is only fair that in choosing them he shall normally have complete freedom, and only eight nominees for such posts ever have been rejected Nominations to judgeships and diplomatic positions have been refused assent—or at all events strongly opposed—with somewhat increased frequency in later decades, yet as a rule are not seriously challenged In other fields and on lower levels—especially in the case of officials operating not nationally but within particular states—the power to confirm or reject is employed freely, and the president must be prepared in case one nomination fails, to offer another or to see the office temporarily stand vacant During a Senate recess, however, a temporary or "recess' appointment may be made, lapsing at the close of the next session unless confirmed—although there is nothing except considerations of expediency to prevent another recess appointment of the same man the moment the Senate adjourns The number of senatorial rejections naturally varies with circumstances If the president and Senate are on good terms, and especially if the president's party enjoys the advantage of a loyal senatorial majority, nominations are likely to be approved almost automatically If, however, there is lack of harmony, rejections or refusals to act will be relatively numerous

2 Other restrictions—senatorial courtesy

In making appointments, the president operates under other restraints of a very practical nature He cannot simply pick men for thousands of posts "out of the air," so to speak Rather, he must depend upon other people to bring candidates to his attention and to make clear their claims to selection, and this opens a way for the great majority of presidential appointees actually to be chosen by senators or representatives belonging to the president's party —principally by senators, yet with representatives often making proposals in the case of federal officials operating entirely within a congressional district, or indeed in the case of others when the state has no senator belonging to the president's party [10] Ordinarily it is useless, too, to nominate a person objected to by a senator from the state concerned, because in deference to a principle of ' senatorial courtesy" as old as the government itself, practically all senators will stand together in refusing confirmation Finally, appointments often are virtually dictated by necessity of placating a wing of the party, meeting a demand of a particular section of the country, or keeping some influential politician in line Small wonder that every president finds his appointing power —in other words, his "patronage"—one of his greatest sources of worry!

Removals

The constitution makes all civil officers of the United States liable to removal by impeachment, but only upon conviction of treason, bribery, or other high crimes and misdemeanors Obviously, there must be removals for incompetency, neglect, and other reasons having no relation to the specified

[10] The coveted influence of members of Congress in selecting appointees furnishes the main reason of course why the president continues to have thousands of appointments to make

grounds for impeachment, and the question of how such removals should be made forced itself upon the attention of Congress almost immediately after the new government under the constitution was set up Two opposing views appeared One was that, since the constitution is silent on the subject (except as to impeachment), the power to remove was to be regarded as implied in the power to appoint, and therefore should be exercised by the same authorities that made appointments—which in the case of presidential' offices would mean by concurrence of the president and Senate Alexander Hamilton was strongly of this opinion The other view was that since the president was to be held responsible for the efficiency of all national administration, it would be unfair to tie his hands by requiring the Senate's consent to removals Madison argued convincingly for this view, and gradually it won acceptance

Various limitations

The president cannot remove judges who hold office during good behavior and are removable only by impeachment He may dismiss members of most commissions exercising quasi legislative and quasi judicial powers (such as the Interstate Commerce Commission) only for reasons fixed by Congress in a relevant statute [11] And, through department heads or other subordinates, he may remove officials who secure appointment under the merit system only 'for such causes as will promote the efficiency of the service" But otherwise he can remove any civil officer of the United States at any time, for any reason, and without giving any explanation, and this is no less true of officers appointed for the customary four year term prescribed by various tenure of office acts than of those whose tenure is indefinite [12] Furthermore, the Senate no more can compel a removal to be made than prevent one Nor can it, after confirming a nominee, reverse its action [13]

## DIRECTION OF ADMINISTRATION—ISSUING ORDERS AND REGULATIONS

Quite as important as the president's authority to appoint and remove officials is his power to direct them in performing their duties As exercised today, this power is the outcome of long and somewhat precarious development The idea of the constitution s framers was that the control of administration should be divided between the president and Congress, and when the first executive departments were established it was specified that the former should have power to direct two of them, *i e* State and War, but that the head of the third, *i e*, the Treasury, should report directly to Congress Earlier presidents used their directing power sparingly, and the courts viewed it as substantially limited to the fields in which it was expressly conferred

Notwithstanding the spectacular growth of executive power in these later days, Congress still wields a great deal of control over the administrative agencies and operations of the government It is Congress that creates the

[11] This was established in the case of Rathbun v United States (295 U S 602 1935), [illegible] to remove William E. Humphrey [illegible] with the Admin-

Diffusion of control over administration

executive departments and as a rule their more important subdivisions (the independent establishments, too) and determines what their functions shall be It is Congress that says, in many situations, what shall be done and—in so far as it likes—how it shall be done Congress alone can provide the requisite funds, and it can investigate, criticize, and suspend or permanently stop many, if not most kinds of administrative activity, regardless of the wishes of the president and his administrative associates Moreover, many lines of responsibility and control run directly from administrative agencies to Congress, with in fact 'a maze of criss crossing relationships between the president Congress, and the departments, independent commissions, public corporations and other agencies composing the federal establishment" Nevertheless Congress does not, and cannot, itself *administer*, day in and day out, it is the president—personally or through his higher subordinates—that exercises direction and control, and Congress not only accepts this fact, as it must, but steadily contributes to exalting the executive power of direction by providing new governmental machinery to be operated by the president, and by assigning all manner of directive duties and tasks to him

Basis and extent of the power of direction

In point of fact, the directing power is one which must have developed in a large way in any case Not only does the power to remove involve the power to direct, but the latter power has a clear constitutional basis in the injunction that the president shall 'take care that the laws be faithfully executed,' and his inaugural pledge that he will 'faithfully execute" the office of president and "preserve, protect, and defend the constitution" His foremost duty, indeed, is to see that the laws are enforced—not only the acts of Congress, but treaties decisions of the federal courts, and all other national instruments having back of them the authority of the constitution, and to this end he must be regarded as endowed with power to direct his administrative subordinates, even as he is authorized to use the armed forces when necessary Acts required of heads of departments and other executive officers by law, *i e*, acts which are 'ministerial' rather than political, are, it is true, theoretically outside of the president s jurisdiction, in case of neglect, there are judicial procedures for compelling performance of them Nevertheless, even here the president may assert himself, he may, in fact go so far as to threaten removal of an officer for performing an act required of him by Congress thereby forcing upon him a disagreeable choice between incurring judicial action and losing his position

The power to issue orders

Closely related to the power of direction is the power to issue commands and regulations in the form of executive ordinances or orders The nature and scope of the government's multifarious activities are defined, at least broadly, in the constitution and in acts of Congress, but the details of organization, the forms of procedure, and, in general, the *minutiæ* of administration are, and must be, left to be worked out and put into effect by those who stand closer to the work to be done Thus, an immigration law, in seeking to debar paupers and criminals from admission to the country, will declare general policy and may specify rather fully the methods by which the policy is to be carried out Yet it will remain for the executive branch of the government to prescribe

most or all of the detailed regulations covering the work of inspection, the handling of appeals from decisions of the examining officials, and similar matters, and such regulations, if made under proper authority, have full force of law Most of this "subordinate," or "administrative," *legislation is framed* and promulgated by heads of departments, or even by their inferiors A considerable amount, however, comes also from the president—although even in this case it is likely to be prepared by the head of a department, or under his direction, on matters pertinent to his field In any event, ultimate responsibility for all regulations and orders issued rests with the chief executive, who himself promulgates (among other things) the Consular Regulations and the Civil Service Rules, together with rules for the customs and internal revenue services In some instances he acts by virtue of powers inherent in his constitutional position, *e g*, as commander-in chief of the armed forces, in others, *e g*, in fixing the duties to be paid on imported goods under our trade agreement legislation, he acts by express statutory authority, in still others, he proceeds on the basis of powers inferred from the nature or tone of the law to be executed [14]

## PARDON, REPRIEVE, AND AMNESTY

*Nature and procedure*

Finally (with foreign relations and war powers reserved for discussion in later chapters), there is the president's power, as chief executive, to grant pardons and reprieves [15] The effect of a full pardon, the Supreme Court has said, is to make the offender, in the eye of the law, "as innocent as if he had never committed the offense ' A reprieve, of course, is only a postponement of the execution of a sentence In wielding the pardoning power, the president acts in complete independence of Congress *and of the courts, it is for him* alone to say who shall be pardoned, at what time, and under what circumstances, subject only to two constitutional limitations he cannot pardon a person who has been convicted by impeachment and thus restore him to office, and he can pardon only in cases in which the offense has been against the authority of the United States as distinguished from that of a state An application in behalf of a convicted person may have any one of several results (1) full and unconditional pardon, (2) pardon qualified by conditions, and revocable if the beneficiary fails to live up to them, (3) parole without pardon, (4) *commutation of sentence*, having the effect of shortening a period of imprisonment, substituting a fine for imprisonment, substituting life imprisonment for death, or otherwise reducing a penalty, (5) reprieve, or mere delay of punishment, and (6) refusal to take any action at all Every application received is looked into by a pardon attorney in the Department of

[14] Limitations upon the authority of Congress to delegate regulative powers have been [illegible] Congress may of course recall a delegated power [illegible]

Art. II, § 2, cl 1

Justice, the district attorney and presiding judge in the district where the petitioner's trial was held are likely to be consulted, the attorney general makes a recommendation, and usually the president's direct participation is confined to carrying out the recommendation made Ultimate responsibility for what is done is however, the president's, and while commonly he does not per sonally hear persons pressing a case, he may do so in instances where grave doubt exists or important questions of public policy are involved In the interest of impartial justice, he and every one having to do with pardons must be prepared to withstand touching appeals and powerful influences [18]

A modified form of pardon is amnesty, which is a sort of blanket pardon extended to numbers of people who, without having been individually con victed are known to have violated federal law, as by engaging in rebellion Amnesties may be declared by act of Congress, but the usual method is presi dential proclamation illustrated by President Johnson s amnesties of 1868 applying to people who had supported the secession movement

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[18] The number of applications runs to about 1 600 a year In some states courts have a right to suspend the sentence of a convicted offender No federal court however enjoys such power for under the const tut on clemency is exclusively an executive function

## CHAPTER 21

# National Administration—Patterns and Problems

Politics and administration

One does not have to be an expert on government to recognize two basic activities as very nearly summing up everything (1) deciding upon policy and (2) carrying policy into effect—the first essentially a matter of politics, the second a matter of administration By 'politics' is meant, of course, a great deal more than mere party conflict Included in it are the birth and growth of ideas, the development of principles the formation and expression of opinion, the organization and techniques of parties propaganda, electoral procedures, judicial interpretation, and especially legislation—in short, all thought and action serving to mold ideas into policies and to translate policies into law By administration is meant the processes and procedures by which policies laid down in statutes, rules, orders and judicial decisions are put into effect, the 'housekeeping' activities of government carried on, and the personnel requisite for performing such work recruited assigned its tasks, promoted, paid, disciplined, and directed Policy making is concerned primarily with ends or objectives, although often incidentally also with means, administration, primarily with machinery, methods, and techniques On all levels of government, the two dovetail and overlap, legislatures exert control—ultimately supreme control—over administration and administrators, by influencing and interpreting the laws intrusted to them, share in shaping policy One vast segment of the national government however, sometimes referred to as a "fourth branch' has administration as its essential purpose In numbers employed (more than 90 per cent of total federal civilian personnel), volume and variety of functions performed, and cost to the taxpayer, the country's 'big government is primarily big administration"

The significance of administration

Administration, furthermore, is quite as important as policy making Congress may deliberate through long months in Washington (likewise a legislature in a state capital), and enact laws by the score, without touching the citizen or his pocketbook unless these laws are applied and enforced by administrative authorities It is indeed, the quality of administration that mainly conditions the effectiveness of the democratic process Good laws are, of course, desirable, and justice through the courts is indispensable But it is easier to get good laws and impartial court decisions than to secure uniformly economical and efficient administration The legislature has only to declare its will in an act of broad and general scope, and thereupon its work is finished The

real task remains—to fit the words and phrases to the existing public situation, to select the officials who are to interpret the law and apply it, to instruct, supervise, and discipline these officials, to settle innumerable questions of detail (many of them highly technical, many involving important matters of principle), to prevent laxity, favoritism, and fraud It has been an American failing to assume naively that all that is necessary in order to achieve a desired end is to "pass a law" As a people, we are only beginning to understand that, even when a law is well conceived and in good form, the vital test comes in the administering of it And such administration is no mere technical process, on the contrary, it is a very human affair, coming close to the people, and dependent for its effectiveness quite as much upon the people's attitudes and reactions as upon the competence and diligence of the administrators themselves By its very nature, too, administration must function all of the time, day and night, 52 weeks a year Congress sometimes goes several months without meeting, and the courts are accustomed to lengthy recesses between terms Administrative management and operation, however, must be kept up incessantly, individual administrators may take vacations, but administration is never adjourned [1]

## PRIMARY FEATURES OF THE NATIONAL ADMINISTRATIVE SYSTEM

1 National self sufficiency

National and state legislatures and legislative processes are entirely separate from each other, and so are the systems of national and state courts In the field of administration, however, there is a good deal of interlocking, extending indeed to all three major levels of government—federal, state, and local Thus, federal elections are managed by state and local officers acting under state law, and state courts as well as national courts naturalize aliens under national law Offenders against national laws may be apprehended by state and local police, as well as by United States marshals and other federal agents State and local officials were drawn deeply into the enforcement of the Volstead Act when national prohibition was in effect, and still help enforce federal pure food and drug acts, federal wildlife and game laws, the federal plant quarantine law, and federal public health measures In the domain of agriculture, such interrelationships are particularly significant, selected in each state by procedures originating in the state agricultural college, county agricultural agents, for example, serve federal, state, and county governments simultaneously, with all usually sharing in compensating them [2] The defense and war effort of 1940 45 saw federal selective service legislation carried out through state and local agencies, and state and local defense councils used extensively by federal defense and war agencies, as in the rationing program,

[1] Growing recogn t on n th s co n [illegible] reflected in the [illegible] jou [illegible]

[2] [illegible] fiel [illegible] ret [illegible] into the states

and under the new defense effort launched in 1950 51 the pattern has been revived Notwithstanding all this, however, a main characteristic of the national administrative system is that the national government still is essentially self sufficient, in the sense that its laws are, as a matter of principle and to a very great extent in practice, carried out and its work performed by its own separate administrative personnel

**2 The pattern of federal administrative organization**

One unfamiliar with the machinery of our national administration might naively suppose that it could rather readily be diagrammed as a vast but simple pyramid, with the president at the apex, branches ramifying symmetrically downwards through various layers or levels, and every agency fitting neatly into its appointed position Even a casual glance, however, at a recently issued official chart listing some 1,880 different federal agencies down to the 'division" level would prove this an illusion If plans of reorganization brought forward by commissions that have studied the situation had been fully carried out, some such picture might present itself But from even the most extensive study ever undertaken (that by the Hoover Commission of 1947-49)—followed by an unusual number of actual changes—no such simple pattern can be expected to emerge

**(a) Executive departments**

Dominating the scene today are, of course, the formerly 10, now 9, executive departments created by Congress and serving as principal administrative arms of the president [3] The constitution itself does not provide in so many words for such departments, nor, of course, say how many there shall be or what they shall be called It, however, plainly assumes that departments will exist it authorizes the president "to require the opinion, in writing, of the principal officer of each of the executive departments", it also empowers Congress "to vest the appointment of inferior officers in the heads of departments", and a large share of the burden of administrative work today is carried by the several departments thus far set up—State, Defense, Treasury, Post Office, Interior, Justice, Agriculture, Commerce, and Labor [4] Structurally, the departments are a good deal alike (1) in being presided over by a single official, known in most instances as the 'secretary , (2) in having (in all but two cases) an under-secretary relieving the pressure upon the secretary and on occasion acting as his substitute, (3) in having usually from one to four assistant secretaries for supervision of major areas of departmental work, (4) in containing a considerable list of higher-level operating units (variously known as bureaus, divisions, 'offices," and 'services"), usually with a single head (variously known as 'commissioner," 'director," "comptroller," or "chief"), and with functions so grouped as ordinarily to give each unit a reasonably coherent task to perform, and (5) in further division and subdivision of these units according to varying patterns In other words, intra-

[3] Even in off[illegible] "adm nistrat ve" are employed very loose[illegible]
In [illegible]
na [illegible]
be [illegible]
kn [illegible]
De [illegible]
me [illegible]

# EXECUTIVE BRANCH OF THE GOVERNMENT

THE PRESIDENT
OF THE UNITED STATES

EXECUTIVE OFFICE OF THE PRESIDENT

THE WHITE HOUSE OFFICE
BUREAU OF THE BUDGET
COUNCIL OF ECONOMIC ADVISERS
NATIONAL SECURITY COUNCIL
NATIONAL SECURITY RESOURCES BOARD
OFFICE OF DEFENSE MOBILIZATION

U.S. CIVIL SERVICE COMMISSION
GENERAL SERVICES ADMINISTRATION

DEPARTMENTS AND AGENCIES

DEPT OF STATE
DEPT OF THE TREASURY
DEPT OF DEFENSE
DEPT OF JUSTICE
POST OFFICE DEPT
DEPT OF THE INTERIOR
DEPT OF AGRICULTURE
DEPT OF COMMERCE
DEPT OF LABOR
FEDERAL SECURITY AGENCY
HOUSING AND HOME FINANCE AGENCY
VETERANS ADMINISTRATION
FEDERAL MEDIATION AND CONCILIATION SERVICE
FEDERAL CIVIL DEFENSE ADMINISTRATION
OFFICE OF THE HOUSING EXPEDITER
PHILIPPINE ALIEN PROPERTY ADMINISTRATION
ECONOMIC COOPERATION ADMINISTRATION
SELECTIVE SERVICE SYSTEM
ECONOMIC STABILIZATION AGENCY
DEFENSE TRANSPORT ADMINISTRATION
DEFENSE PRODUCTION ADMINISTRATION

MULTI-HEADED AGENCIES

INTERSTATE COMMERCE COMMISSION
FEDERAL TRADE COMMISSION
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
FEDERAL POWER COMMISSION
SECURITIES AND EXCHANGE COMMISSION
FEDERAL COMMUNICATIONS COMMISSION
NATIONAL LABOR RELATIONS BOARD
EXPORT IMPORT BANK OF WASHINGTON
RECONSTRUCTION FINANCE CORPORATION
TENNESSEE VALLEY AUTHORITY
FEDERAL DEPOSIT INSURANCE CORPORATION
NATIONAL ADVISORY COMMITTEE FOR AERONAUTICS
UNITED STATES TARIFF COMMISSION
NATIONAL MEDIATION BOARD
RAILROAD RETIREMENT BOARD
ATOMIC ENERGY COMMISSION
NATIONAL SCIENCE FOUNDATION
SUBVERSIVE ACTIVITIES CONTROL BOARD
SMITHSONIAN INSTITUTION
COMMISSION OF FINE ARTS
AMERICAN BATTLE MONUMENTS COMMISSION
NATIONAL CAPITAL PARK AND PLANNING COMMISSION
NATIONAL CAPITAL HOUSING AUTHORITY
TAX COURT OF THE UNITED STATES
PHILIPPINE WAR DAMAGE COMMISSION
INDIAN CLAIMS COMMISSION
DISPLACED PERSONS COMMISSION
MOTOR CARRIER CLAIMS COMMISSION
WAR CLAIMS COMMISSION

TEMPORARY AGENCIES

In January 1952 the Economic Coöperation Administration was dissolved and its function taken over by the newly established Mutual Security Agency under the jurisdiction of the Executive office of the President

departmental organization is largely on the traditional bureaucratic model, with the secretary at the apex and with successive levels of officials beneath him, ramifying downwards to the lowest grades of civil service employees

(b) Independent establishments

But much administrative machinery never has been placed in any department Starting with the Civil Service Commission in 1883 and the Interstate Commerce Commission in 1888 independent establishments'—created usually by statute but sometimes by executive order—so multiplied that even before the Franklin D Roosevelt Administration s recovery program was launched in 1933 they reached a score or more, and the New Deal the national defense program instituted in 1940, and the ensuing war gave rise to a bewildering array of additional ones Some collapsed because of judicial invalidation of legislation on which they rested, some have been consolidated with others or abolished outright On the other hand, the defense mobilization undertaken in 1950 51 has yielded a new group, and, all in all, nearly half of the 1,880 federal agencies listed in the official chart mentioned above are found outside of the departments, either as (1) completely isolated, self contained establishments like the United States Tariff Commission, the Export-Import Bank of Washington, or the National Mediation Board, or (2) as bureaus or other branches of wide spreading agencies like the Veterans Administration, the Federal Communications Commission, the Economic Stabilization Agency, and the more recently created Office of Defense Mobilization, or (3) as establishments brought together under one or another of three great cooperating agencies ' or administrations"—the Federal Security Agency,[5] the Housing and Home Finance Agency, and the General Services Administration (absorbing a former Federal Works Agency), the first set up in lieu of a new executive department which President Truman asked for but Congress declined to create [6]

Some of the larger independent establishments, *e g*, the three 'agencies" mentioned and the huge Veterans Administration, are organized on the general pattern of an executive department, with a single head, with "offices" or bureaus as main branches, and with these split into many 'divisions' or other units The majority, however, take the form of boards or commissions, with the usually three, five, or seven members sharing equally in authority and the chairman serving simply as general manager, although auxiliary to the board itself will be found, in cases like the Interstate Commerce Commission

establishment ... ndependent agencies to perform given tasks rather than ...nts have been varied Sometimes ...ometimes there was desire not to ...n seemed to call for a type of ...r than those ordinarily employed ...ngress was desired than can be ...imes a pressure group would be ...onomous establishment sometimes ...carelessness

and the Federal Trade Commission, an array of secretaries, counsellors, bureaus, divisions, and the like, reminding one of those found in the departments The tendency is to employ boards and commissions when the work to be done is not primarily administrative, but involves chiefly making "quasi legislative" regulations and quasi judicial determinations—in other words, when what is needed is not so much prompt and positive action as consultation, deliberation, and considered decision shared in by several minds Members are likely to be so selected as to represent different political parties and varied social and economic interests, long terms promote expertness, and arrangements for overlapping prevent a complete change of personnel at any given time [7]

**(c) Government corporations** A special form of establishment arises when, for carrying on activities publicly planned and undertaken but similar in nature to private business, Congress sets up a government corporation, owned (*i e*, most or all of the capital provided) by the government, presided over commonly by a general manager acting under authority of a board of directors, and either attached to a department or left independent, but in any case enjoying (in spite of stronger controls introduced in 1945) a freedom of action—in buying, selling, borrowing, loaning, managing—that makes it, as some one has remarked, the most independent of independent establishments, even when nominally within a department Best known among the 70 or 80 present agencies of the kind are the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, the Federal Crop Insurance Corporation, the Inland Waterways Corporation and the Tennessee Valley Authority [8]

**(d) Field services** Most people think of the national government as carried on simply in Washington and its environs That post offices and revenue-collectors' offices are widely scattered, is of course, well enough known But few persons have any conception of the extent to which still other agencies of federal administration and management—along with the laws and courts—operate throughout the entire country and even outside The truth is that from Maine to California, the familiar pattern of states, counties, cities, and the like is overlaid with criss crossing patterns of federal administrative jurisdiction (regions, sections, districts, areas, zones, centers, and what not), less conspicuous, and often quite unknown to the layman, yet indispensably linked as operating areas to the controlling central establishments in the national capital In 1946, a bare list of such federal geographical units filled 55 pages of print, while individual cities like New York, Boston, Atlanta, New Orleans, Chicago, Denver, and San Francisco were the sites of literally hundreds of regional or other field

offices In the Treasury, Defense, Justice, Agriculture, Interior, Commerce, and Labor Departments, almost every service of a nature requiring it to operate locally (and the majority are such) has its own set of administrative regions or districts, with directors, boards, or other authorities heading up divisional machinery Even independent establishments like the Civil Service Commission, the Interstate Commerce Commission, the Federal Reserve Board, and the Veterans Administration are similarly equipped It will not be surprising, therefore, to discover, in the next chapter, that of the entire federal civil service, less than 11 per cent works in Washington and all of the remainder elsewhere in the country

3 Type of functions

So vast and varied are the functions performed by agencies of the foregoing kinds that one could find numerous ways of classifying them Obvious enough would be a classification as investigative, administrative, and quasi-legislative and quasi-judicial Another grouping would be (1) those that involve, not service to or regulation of the public directly, but rather service to other agencies of the government, such as is rendered by the Treasury Department, the Bureau of the Budget, the Civil Service Commission, and the General Services Administration, (2) those consisting, at least primarily, of rendering services directly to the people, and including most of the work of such departments as Agriculture, Commerce, Labor, Post-Office, and Interior, and of establishments like the Office of Education, and (3) those that also are for the ultimate benefit of the people, but operating through regulation and restraint of private individuals and corporations, good examples being the work of the Department of Justice, the Interstate Commerce Commission, the Federal Trade Commission, and the Securities and Exchange Commission

Viewing the matter with respect to any single department or agency, the classification well might be into (1) overhead," or "staff," functions, having to do with personnel, equipment, funds, and other means by which the establishment's work is carried on—a matter of departmental or agency housekeeping, and (2) "direct service," or "line," functions, having to do with the services rendered or regulations imposed in relation to the government in general or to the public Manifestly, the latter functions constitute an establishment s sole reason for existence, all others are only means to an end

4 Lines of re sponsi bility and control

By its nature, administration is the work of subordinates, even the heads of departments are subordinate to the president Consequently, all administrators are presumed to be subject to control from some source In point of fact, members of the national administration are subject to control from a number of sources (1) To begin with, they are controlled by and responsible to their immediate superiors, and this applies to heads of departments no less than to personnel farther down the ladder Under cabinet systems, department chiefs, as ministers, are directly responsible to the popular branch of the legislature But not so under our presidential system, here, whatever such officials do is considered as done by the president, he takes responsibility for their acts before Congress and the country, and, fortified with the power not only of direction but of removal, he naturally will hold them

answerable directly to himself (2) At the same time, Congress also has a place in the picture, because, after all, it not only has set up the departments and directly or indirectly authorized virtually all of the other agencies, but often has fixed their duties and functions, and, defined in this way by law, such duties and functions normally are beyond the power of the president to modify or suspend—except in so far as he may take the dubious course of neglecting or refusing to see that they are performed Congress, furthermore, controls through the power of the purse, through its right to demand reports and conduct investigations, and, in extreme cases, through its power of impeachment (3) Finally, there is possibility of control also by the courts The general principle is that when an administrative officer is carrying out a provision of law which manifestly leaves room for discretion, he is performing a political act and cannot be called to account for it in a court, but that, on the other hand, when a duty or action is so defined by law as to allow no latitude for choice, it is *ministerial* and subject to judicial review

As compared with administrators in the departments, independent establishments (some of which are only incidentally administrative) sustain varying and even uncertain, relationships Some are clearly responsible to the president, others, rather to Congress, still others are more or less answerable to both, or even occasionally to neither, and such confusion furnishes a main argument sometimes employed against further multiplying such bodies

## DEPARTMENT HEADS AS TOP-LEVEL ADMINISTRATORS

With individual departments and establishments held over for comment at later appropriate points, a word on the general rôle of department heads (in addition to advisory functions in the cabinet) may be included here

1 Appointing and removing subordinates

To start with, the great majority of subordinate officials and employees in the departments are appointed, directly or indirectly, by the department chiefs—acting, of course, as always, in the president's name Most inferior positions filled in this way have, it is true, been placed in the classified service, with appointments subject to the limitations of the civil service laws and regulations, and of course this leaves the appointing officer with relatively little personal 'patronage" Selection of personnel, nevertheless, remains an important function, and with it goes power to remove, although (again under civil service regulations) only for promoting the "efficiency of the service

2 Directing the work of the department

Subject to the supreme directing power of the president and to varying controls by Congress (and, if the truth be told, by more experienced and often better informed subordinates), each department head, guides and supervises the work of all bureaus, divisions, offices, and other agencies in the department under his care How much he will himself be directed by the president will depend upon circumstances, *e g*, how strongly disposed a given president may be to assert himself, how much confidence the president reposes in the secretary s capacity and judgment, and the degree to which decisions of major importance are required by special conditions existing at a given time But in any case it falls to the department head (within the limits imposed by

Congress and the chief executive) to wield a general power of direction and control over the branch of administration intrusted to him, as also to represent the department's interests in procuring appropriations, increases of pay, and better working conditions.

3. Issuing rules and regulations

Another highly important function is that of issuing rules and regulations. The far reaching and ever-expanding ordinance power of the president has been commented on in another connection. Many "executive orders" relating to the functioning of a department, however, are actually prepared by the department head or under his direction. Moreover, in many instances, administrative regulations are not only prepared in the departments, but promulgated in their name, or even in the name of a bureau or division. Good examples include the voluminous regulations under which federal taxes are collected, the postal service carried on, and the immigration laws administered. Indeed, each department head is authorized by statute "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it," and also to make rules appropriate for securing proper examination of accounts. Broad regulatory powers covering specified matters have been conferred, too, upon particular department heads, bureau chiefs, and the like, as well as upon commissions and other agencies outside of the departments.

4. Deciding appeals

Still another significant function of the department head is to decide disputes arising out of acts of his subordinates. In administration of the laws governing such matters as taxation, conservation, farm credit, postal operations, and labor standards, controversies inevitably develop. Persons affected unfavorably may think that an official has exceeded his powers, or that he has reached a decision not warranted by the facts, and fairness demands that opportunity be afforded for a reconsideration of the decision or action. Conceivably, all such questions might be carried to the courts. But the federal Supreme Court itself has explained that, while appeal to the courts is proper enough when the construction of a statute is involved, such appeal, if permitted in the multitudes of disputes arising out of the ordinary field operations of the departments, would so swamp the courts as to "entail practically a suspension of some of the most important functions of government." [*] Hence, except when decision hinges upon an interpretation of law, appeal normally lies only to higher administrative officials or boards, including in the later stages the heads of departments, and in many kinds of cases—for example, appeals against closure of the mails to persons and concerns alleged to be engaged in fraudulent operations—the verdict of the department head is final, although in a limited number there is appeal to the president himself.

Although some departments (*e g*, State) are more essential to the president in discharging his constitutional functions than are others, all department heads are alike responsible to the chief executive, and all not only

[*] American School of Magnetic Healing v McAnnulty, 187 U S 94 (1902)

5 Supplying information and giving advice

give him information and advice in the course of cabinet meetings and personal conferences, but submit more formal reports and recommendations which may or may not become common property at both ends of Pennsylvania Avenue Congress, too, has the benefit of information and advice given in committee hearings, and receives plenty of proposals for legislation coming straight from department heads Both president and Congress, indeed, may at any time make requests of such officials for information, and perhaps papers, with or without opinions and advice The president is likely to ask informally and orally, Congress, or either house, through the medium of resolutions or of requests from committees Armed with the power of removal, the president can enforce compliance But Congress is in a different position, if a department head refuses to respond to a request, and is upheld by the president, the two houses are helpless unless willing to resort to the extreme procedure of impeachment [10] The Supreme Court has held, furthermore, that when the head of a department is required to give information, he may do so through subordinates, rather than in person

6 Serving on boards and committees

Finally, all heads of departments, but especially those of such departments as Defense, Treasury, Interior, Agriculture, and Labor, are called upon to serve *ex officiis* as members of various planning, supervising, or coordinating boards and committees, *e g* the National Security Council and the National Security Resources Board In some instances, duties are only nominal, but in others there is important work to be done, either in person or by proxy

## THE PROBLEM OF ADMINISTRATIVE REORGANIZATION

Cardinal principles of good administration

Experts tell us that efficient and economical administration, in city, state, or nation, requires adherence to certain rather definite principles

1 The multifold tasks to be performed should be grouped according to their nature and each group assigned to one of a relatively small number of fairly large and essentially coordinate departments

2 The grouping should be on a carefully considered functional basis, so that each department will occupy and have full control over a definite and integrated field

3 Every agency and every official should stand in some definite relation to
sharply

ganized
in a civil service, classified according to the nature of the duties to be performed recruited by methods guaranteeing fitness and enjoying security of tenure

Other principles, relating for example to budgeting, might be mentioned, but the four enumerated are chiefly pertinent in this and the succeeding chapter

It no doubt was inevitable that a federal administrative structure built up over the years largely without plan or design, "like the barns, shacks, silos, toolsheds, and garages on an old farm," should in time have been found violat-

[10] Cf p 230 above

**Faulty conditions develop in federal administration**

ing every one of the standards indicated At the close of the first 100 years under the constitution, nearly everything was gathered in seven executive departments, concerned almost entirely with traditional and primary functions of government such as foreign relations, defense, finance, and justice As the activities of government later multiplied however, not only did the machinery of existing departments expand, but new departments—Agriculture, Commerce, Labor—took their places in the lengthening list, and, more serious, functions began to be assigned to commissions, boards and other agencies only loosely attached to any department or, more often, not attached at all In time, and especially after the swift and gigantic growth of the past 25 years, the result was a labyrinth in which even a well informed observer easily could lose himself

**Some concrete defects**

Even the existing departments, however, were not beyond reproach, on the contrary, several of the number notoriously violated all of the principles mentioned above, notably that of unity and integration Newly created agencies were not always given an independent status, often they were placed in a department But there they sometimes merely contributed to making the establishment more of a jungle of unrelated units and services than before Moreover, in great fields like public health and conservation administrative and regulatory functions often were parceled out among half a dozen different agencies, scattered through three or four departments or in no department at all—a course from which could result only duplication confusion, and waste, accentuated by jealousies and disputes among department heads and bureau chiefs as to who should control particular activities [11]

The third principle, too—that of definite lines of authority and responsibility—was widely ignored The fault was not the president's, agencies were so numerous, so scattered and their relationships so confused, that no man could possibly keep an eye on all of them [12] Indeed, many boards and commissions were so far removed from presidential control that their performance of administrative functions constituted a positive invasion of his rights and responsibilities as over all manager of national administration A Committee on Administrative Management set up by President Franklin D Roosevelt in 1936 very well characterized the situation when with the nine regulatory commissions particularly in mind, it referred to 'a headless fourth branch of the government responsible to no one, and impossible of coordination with the general policies and work of the government as determined by the people through their duly elected representatives'

From far back in the present century, criticism began to be heard, not only

Obstacles to reorganization

from members of Congress, journalists, taxpayers, and indeed administrators themselves but from a rising generation of professional students of public administration as a science and an art Sometimes the animating motive, though disguised, was objection to government (at all events the federal government) undertaking given new services at all, rather than dislike for the administrative arrangements involved But the administrative system (or lack of system) itself also provoked complaint For a long time, the idea of overhauling the national administrative structure was paid lip-service in government circles, but with action paralyzed First among obstacles was the question of who should undertake the task Numerous arrangements calling for change rested upon acts of Congress, authority to alter them must come from that source, and many members conceived reorganization as a legislative function which Congress could not delegate On the other hand, most serious students of the problem agreed that the two houses were not fitted or equipped for the job, that any worth while reorganization would have to be planned by the executive branch and put into effect by presidential order, and that, at most, Congress ought merely to confer the necessary blanket authority and reserve some right of veto upon changes proposed Doubtful, nevertheless, about many of the issues involved, and hesitant to intrust so much discretion to the chief executive, Congress was inclined to shy away from the subject and, when finally induced to act, to confer power grudgingly and with many strings attached

As would be surmised, too, commissioners, bureau chiefs, and other officials and agencies, entertaining a strong sense of their own importance, coveting a maximum of independence, and unwilling to be "abolished" or perchance even transferred, were commonly predisposed against any reorganization program, which, once launched, might place them in peril The pros and cons of many suggested changes, also, were generally rather technical, and people at large, although certainly standing to profit from increased efficiency and economy, were neither much acquainted with the issues involved nor interested in them Even among the well informed, there was honest doubt as to whether some of the changes most often advocated—especially those looking to assembling scattered agencies in existing or new executive departments—would not lead to undesirable over-expansion of national control, with resulting weakening of the position of the states Fear was expressed, likewise, lest reorganization be found to have had the effect of throwing some of the services or agencies into politics

Reorganizations of 1933 47

Presidents Taft, Wilson, and Harding gave their support to reorganization proposals that eventually came to nothing, and although under an act signed by President Hoover a few hours before he went out of office, President Franklin D Roosevelt was able, by executive orders in 1933-34 to introduce a number of changes, the field still was largely untouched when, in 1936, he [illegible] with mak- [illegible] a time, in [illegible] reorgan- izing the Supreme Court, bills aimed at carrying out the resulting recommenda-

tions encountered rough sailing [13] At length, however, in 1939, a Reorganization Act was passed under which the President, at intervals during 1939-40, transmitted to Congress five successive "plans," or groups of proposals, all evoked opposition but none was blocked, and together they gave some sectors of the government's administrative organization a considerably improved appearance Expiring early in 1941 authority to reorganize was restored shortly after Pearl Harbor, although now restricted to changes associated with the conduct of the war, and in ensuing years a multitude of new administrative agencies arose, accompanied by many transfers, consolidations, redistributions, and other changes, even in areas ordinarily thought of as purely civilian The grant of 1941 was for the duration of the war only But manifestly there would be need for new adjustments after peace returned, and late in 1945 Congress met an urgent request of President Truman with a new general Reorganization Act under which a fresh series of reorganizing "plans" submitted in 1946-47 met in certain instances with congressional rebuff but for the most part became effective

## REORGANIZATION SINCE 1947

The Hoover Commission (1947-49)

By 1947, Congress had four times within 15 years conferred more or less guarded reorganizing authority upon the chief executive, and the number of agencies abolished or consolidated, or functions transferred, had passed 300 Only the surface, however, had been scratched, the administrative structure had grown vaster than ever during wartime, and under postwar conditions never would return to its former proportions Coming unparalleled peacetime expenditures counseled the utmost economy And—at least dimly aware that what was needed was no mere continued piecemeal readjustment, but an heroic overhauling based upon an all round study oriented to the new situation—Congress projected a fresh start by creating a bipartisan and widely representative Commission on Organization of the Executive Branch of the Government, charged with investigating the existing structure, functions, interrelations, and procedures of all departments, bureaus, boards, commissions, and other agencies, and with reporting to the two houses at a date safely past the coming presidential election, *i e*, at the opening of the Eighty first Congress in January, 1949 Under the chairmanship of one of its members drawn from private life—ex President Herbert Hoover—the new body [14] set up a "central staff," enlisted some 300 consultants and assistants, organized from among them 24 "task forces" charged with studying particular departments, functions, and services, took testimony from scores of experienced officials,

[13] The report proper was published under the title of *Administrative Management in the* ... 1937), the report together with various

held additional hearings, and, after a year and a half, poured forth a stream of 18 summary reports and almost an equal number of task-force reports (with eventually a "concluding report") constituting the most monumental research product of its kind in our history [15]

Basic differences in political philosophy can be discerned between the lines, and some of the reports were accompanied by lively "dissents" [16] Even with a presidential campaign in progress, however, politics was eschewed and the initial guiding principle adhered to that when any given activity of the government was under review, concern should be, not with whether it was wise, but only with whether (assuming it to be so) there was any more effective and economical way of carrying it on

Principal recommendations

When the Commission completed its labors, it was found to have adopted a total of 288 different recommendations Many, of course, pertained only to the improvement or relocation of particular agencies There was no lack, however, of proposals aimed at all round development of sound administration, and a few of these require mention

1 The number of separate administrative agencies or units should be consolidated into about one third of their existing number

2 For the sake of unity and simplicity, all should be grouped into departments as nearly as possible according to major purpose and including the regulatory commissions in so far as their work was administrative

3 A new department should be set up to administer welfare and educational functions

4 The operating internal organization of departments should follow a standard nomenclature—in the order (downwards) of services bureaus, divisions, branches sections and units

5 Administrative regions and regional headquarters employed by various services for field work should be organized on more nearly the same geographical pattern

6 Department heads should be given authority to control and readjust the organization of their respective departments, with "a clear line of command from the top to the bottom and a return line of responsibility and accountability from the bottom to the top

7 More adequate staff aid should be given the president and department heads with freedom to organize and use it at discretion in improving administrative effectiveness

Ramifying from these and other such seminal recommendations were numerous detailed proposals which, if adopted, would, it was asserted, not only vastly enhance the government's efficiency, but bring savings for the country's taxpayers of $2 or $3 billion a year

Varying reactions

Gradual disclosure of the full scope of the Commission's proposals stirred varying reactions and naturally led to wonder whether, after all was over, the results would be any more impressive than in the case of the almost equally challenging report of the President's Committee in 1937 On the one hand,

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professional students of government evinced lively interest and as a rule warm endorsement, until novelty wore off, much favorable publicity was given in the press, and, recognizing that interest would have to be bolstered and pressures exerted, a group of public minded persons set up a voluntary Citizens Committee for the Hoover Report which in various ways has sought to keep the enterprise alive in Congress and throughout the country All past experience indicated, however, that there would be loud cries of anguish, and stout resistance, from individuals, agencies, and interests considering themselves threatened—as well as much under cover sabotage from officials and others not caring to put themselves on record as foes of reorganization but actually opposed to it, or perhaps for it "in principle but hostile when brought close home Anticipating that from the effort would come at least some reorganization, and preferring that their interests continue to be represented and served by the familiar agencies in the familiar set up, all sorts of groups—chambers of commerce, granges, manufacturers associations, labor unions, and the like—campaigned openly or covertly to get this or that agency exempted from whatever changes might be undertaken Along with the rest of the country, such interests had much to gain, over the years from efficiency and economy in administrative management But shortsightedness often prevailed over sound judgment, while one administrative agency after another braced itself to resist liquidation, consolidation transfer, or other threat to its position

Congres votes new re organiz ing authority

In view of all this, results have been surprising Even before the Commission reported, President Truman asked from Congress, for himself and his successors, a new grant of authority to prepare and submit plans of reorganization, with no administrative agency or function exempted, and with any proposed plan automatically becoming effective after 60 days unless in the meantime disapproved by concurrent resolution of the House and Senate In Congress, the request hung fire while restrictive qualifications of one sort or another were bandied back and forth between the two branches A month, however, after the Commission's ' concluding report appeared, the President was able not only to put his signature to a Reorganization Act of 1949,[11] good until April 1, 1953, but immediately to send to Capitol Hill a first batch of seven reorganization plans prepared in accordance with the measure's anticipated provisions On every previous occasion when voting reorganizing authority to the chief executive, Congress had placed most or all of the regulatory commissions beyond his reach This, however, in the present instance was not done In spite of pressures exerted nothing vital to a general reorganization was [illegible]
troul [illegible]
for ' [illegible]
generously With the other, nevertheless, it had been niggardly, for whereas the President had contemplated possible vetoes of reorganization plans only by concurrent resolution of both houses, the legislation permitted veto by either house singly, and disadvantage from this change was only partially off-

[11] 63 *U S Stat at Large* 203 In the end this measure had the extraordinary experience of being passed unanimously in both houses.

set by requiring for a veto a majority of the total membership (218 in the House and 49 in the Senate) rather than merely a majority of a quorum

Reorganization resumed

Many Hoover Commission recommendations were of such a nature that they could be carried out administratively, without reference to the legislative branch, and some progress on this front has been made The remainder called for attention from Congress—either direct action making them effective or review of presidential proposals under the 1949 law And here, too, there have been results During 1949-50, some 350 bills and resolutions embodying Commission proposals appeared in the two houses, and 70 were enacted into law, while of 35 reorganization plans transmitted from the White House, and usually but not invariably following Commission proposals, 27 became effective In the past year, impetus has been lost and the pace has slackened [17a] But most departments and other major agencies already have been affected, and at the opening of 1951, an official estimate was that 50 per cent of the Commission's recommendations had been carried out, at least in substance To enumerate or describe the resulting changes is, of course, impracticable here, several are touched upon at appropriate points in previous or later chapters But already the reorganization achieved far transcends anything of the kind in our previous history, and the chapter is by no means closed—although in general the remaining proposals are the most controversial [18]

Presidential plans meeting congressional defeat include one for a Department of Welfare, a related one for a Department of Health, Education and Security, and one for reorganization of the National Labor Relations Board Congressional objection to any new department of the kind proposed springs largely from dislike for the "socialized medicine" and other views of Oscar Ewing, present administrator of the Federal Security Agency and considered likely to be made head of the new establishment if created

Lingering congressional jealousy of presidential reorganizing power was freshly displayed early in 1951, when a request by President Truman for authority to make temporary changes deemed useful for the current defense effort was rejected by the House, apparently in part because of fear lest, on one pretext or another, a Department of Welfare be set up

A continuing task

Administrative reorganization may seem a problem and a task that run on and on, without end, and so indeed it is In a governmental system as vast and complicated as that of the United States, no given pattern ever will be found completely satisfactory And even if such perfection could be attained, it would not last, for, administration being essentially a matter of processes

[17a] During 1951 only one additional reorganization plan became effective that reorganizing the Reconstruction Finance Corporation

[18] Standing out conspicuously among changes made are

1 Increase of the top management responsibility of most heads of executive departments [illegible]

[illegible] y Resources Board

[illegible] iment in the new

[illegible] of Defense

and procedures, changing conditions, situations, and needs call continuously for readjustment of the machinery and techniques by which it meets the day-to-day demands upon it In its report of 1937, President Roosevelt's Committee on Administrative Management urged a conception of administrative reorganization as not a task to be performed at a stroke and thereupon considered finished, but rather as an activity requiring ceaseless attention and effort directed to meeting new situations as they emerge, the Hoover Commission emphasized the same viewpoint, and while the idea carries implications none too popular in legislative and bureaucratic circles (even the Reorganization Act of 1949 placed a time limit on presidential discretion), it may in time become virtually axiomatic

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# CHAPTER 22

## The Civil Service and Problems of Personnel

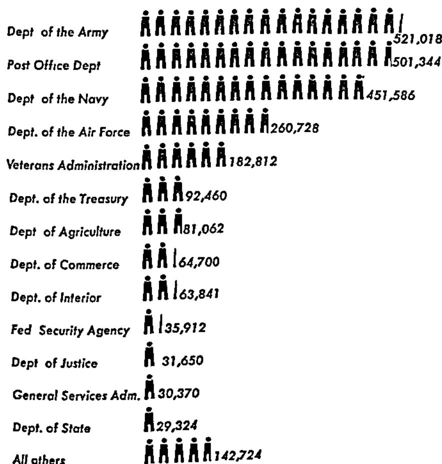
Numbers

Presidents, heads of departments, under secretaries and assistant secretaries, bureau chiefs, division heads, and members of boards and commissions form only a minor fraction of the multitude of men and women who, year in and year out, carry on the civilian activities of the national government. For every such official, literally thousands of others (officers and employees[1]) are found in the widely operating establishment officially known as the executive civil service—'executive," as being attached to the executive rather than the legislative or judicial branch of the government, and "civil," as differentiated from the uniformed members of the Army, the Navy, and other military establishments Under our federal system, all of the states, together with their subdivisions like counties and cities, have civil services of their own, and, lumped together, personnel on these levels heavily outnumbers that on the federal level[2] Standing at only 208,000 when the century opened, the federal service, however, mounted to more than a million in 1941, touched a wartime peak of 3,375,000 early in 1945, fell to a postwar low of 1,966,444 on June 30, 1950, and was carried upward again by war in Korea and a new defense mobilization effort to 2,529,900 by September, 1951 People who complain of "padded payrolls' and other forms of national extravagance talk about getting the number down to 1,500,000, but it is doubtful whether the figure ever will drop to such a level

Scope

Contrary to popular impression, this vast civilian army does not consist simply of "government clerks" or "workers' engaged in dull routine There are, of course, hundreds of thousands such But there also are thousands of men and women of scholarship, professional training, and technical expertness, such as the nature of much modern governmental work requires chemists, biologists, meteorologists, physicians, sanitation authorities, fores-

ters, geologists, agronomists, live stock experts, entomologists, hydrographers, engineers (civil, electrical, hydraulic, mining, highway, etc ), economists, statisticians, and accountants, numerous lawyers, a great body of professional administrators Only a small proportion of the total force live and work in the national capital—on September 30, 1951, only 287,400 as compared with the 2,242,500 then constituting the field services, the latter performing duties in all parts of the land, including the dependencies, and in the case of diplomatic and consular officials, in foreign countries as well For many years before World War II, the proportion of women in the service remained fairly constant at around 19 per cent Under wartime conditions, however, it rose to 37 per cent, and on January 31, 1950, was still a little over 30 per cent



## EARLIER PERSONNEL PROBLEMS—SPOILS VERSUS MERIT

Importance of personnel

These men and women "in the trenches" do not, moreover, operate as a mere piece of power-driven machinery—an array of robots in a vast, mechanized, impersonal "bureaucracy" On the contrary, they are human personalities, with all the virtues and frailties, wants and ambitions, of other people, and while the efficiency with which they perform their tasks depends to a degree upon the quality of the laws given them to administer, upon the intelligence of the supervision provided, and upon the adequacy of funds made available, the matter of greatest importance is the fitness of the civil servants themselves for public employment More is involved in civil service than personnel But that is the heart of it, and accordingly the questions chiefly to be raised here are such as How are civil servants recruited? Are they selected for reasons of demonstrated merit, or on merely personal and political grounds? How are they classified and paid? How is their work evaluated, and under what conditions are they promoted? How may they be disciplined? How are removals made, and why? What arrangements are there for retirement? What facilities for training? To what extent does the service offer opportunity for a career?

Appointments of 1789 1829

For a generation or more after the national government was organized under the constitution, the selection and appointment of administrative officers and employees left little to be desired Washington placed the matter at the outset upon a high plane by announcing his intention to "nominate such persons alone to offices as shall be the best qualified", and although the rise of political parties led his early successors to give more weight to political considerations when filling posts as they fell vacant or as new ones were created there were not many removals for partisan reasons—except for a limited number during the first two years of Jefferson's first administration

Jackson and the spoils system

Then came the election of Andrew Jackson, and with it a new theory and practice concerning personnel in the national government Already, a Tenure of Office Act of 1820 had helped set the stage for a spoils system by fixing a four year term for district attorneys, collectors of customs, and other groups of officials, thereby giving every incoming president a large number of positions to fill without the inconvenience of discovering plausible reasons for removing competent incumbents Out of Tennessee came Jackson with the conviction, first, that any man of average intelligence and industry ought to be able to master the duties connected with practically any public office, second, that "more is lost by the long continuance of men in office than is generally to be gained by their experience", and, third, that in the past appointments had gone too largely to the seaboard states, with the rising frontier democracy overlooked Putting his views into execution, the new chief executive did not indeed make the clean sweep of anti Jacksonian officeholders for which many of his supporters clamored, but nevertheless filled substantially all vacancies as they arose with men who thought as he did, and in addition removed, in his first year alone, officers and employers of all grades to the then unprecedented number of some 700

The blame for fastening the spoils system upon the country is, however, not to be laid entirely, or even mainly, at Jackson's door. In the first place, removals and appointments on partisan grounds already were common in New York, Pennsylvania, and other states, and also in cities—the practice now being merely carried over in a large way into the domain of the national government. In the second place, the tightening up of party machinery, and the vigorous revival of party politics following the so-called "era of good feeling," would almost certainly have led in any case, under conditions then existing, to an increased use of public offices as rewards for party service. Finally, Jackson's views on office-holding, while of course deplored by many people, were simply those of the new democracy (especially in the West and South) mainly responsible for his election. When, in 1832, Senator William L. Marcy of New York epitomized the viewpoint of Jacksonians in his famous slogan, "To the victors belong the spoils," he coined a phrase that readily passed into general currency. Already, removal as well as appointment for party reasons was becoming part of the accepted order of things in nation, state, and city.

Some points of view about spoils

Nor should the surrender to the spoils idea be ascribed to mere perversity. We are accustomed to regard it as almost axiomatic that the hundreds of thousands of civil servants who administer our laws and spend our money should be selected solely on the basis of fitness as shown by competitive examinations or other tests. And undoubtedly it is true that the practical politicians of all generations have been lukewarm toward, or openly opposed to, what we call the merit system, for no more exalted reasons than that they wanted to be able to secure appointments for their relatives, friends, and henchmen, and also to be in a position to influence and control appointees obligated to them. In Jacksonian days and since, however, there have been arguments for the spoils principle *(or at any rate against any restrictive merit policy)* which, while often specious, and frequently representing nothing more than lame attempts to rationalize attitudes really motivated by selfishness and greed, nevertheless sometimes were sincere and even worthy of respectful consideration. It has been contended, for example, that we operate our national and state (and often local) governments through a party system, that parties are indispensable in a democracy, and that parties cannot thrive, or even endure, without the invigoration that comes from having offices and jobs to dispense to the faithful. There is the point of view, too, that when the people elect a new president and he very properly gathers around him a corps of chief administrators of his own political persuasion, the change should go all the way down the line, so that higher officials will not find themselves compelled to work with unsympathetic and perhaps uncoöperative, subordinates. In the long run, it is argued, the best results will be attained by placing squarely upon appointing authorities full and unfettered responsibility for selecting the personnel with which they choose to work. Jackson thought, and so do some people today, that, just as *no one* has any *right* to be appointed to a public position, so no appointee has any *right* to be continued in his post indefinitely; otherwise, equally deserving people are denied opportunity. And this suggests the Jacksonian concept also of rotation as being not only cal-

culated to keep the government service vigorous through the infusion of fresh blood, but indispensable to the equality of opportunity presumed in a democracy

Beginnings of reform

Notwithstanding such lines of argument—to all of which there are, of course, convincing answers—people after Jackson's day could not wholly close their eyes to the unfortunate consequences of the orgy of spoils amidst which they lived On all sides, experienced and worthy public officials were ousted to make room for political henchmen Every time a change of administration took place, the public services were thrown into demoralization The president was harassed almost beyond endurance by place seekers and their friends Senators and representatives (like legislators in the states) found themselves pursued day and night by importunate constituents, with much of their time and energy diverted from more important things Administration fell to a generally low level, politics itself grew more mercenary and corrupt As early as 1853 and 1855, Congress undertook, in a feeble way, to improve conditions by requiring that some thousands of clerkships in Washington be classified on a basis of compensation, and that candidates be appointed to these positions only after examination by the head of the appropriate department Even on this limited scale, the reform came to nothing, and an act of 1871, under which our first national civil service commission was set up and a broader scheme of competitive examinations introduced, proved almost equally barren of results

The Pendleton Act (1883)

Happily, the cause was not lost Able men like George William Curtis and Carl Schurz, turned their best energies to its support, national and state civil service reform associations were organized,[3] recent reforms in Great Britain were studied *Harper's Weekly, The Nation*, and other influential journals took up the fight, the assassination of President James A Garfield by a disappointed office seeker in 1881 supplied dramatic impetus, and the new president, Chester A Arthur, confounded the prophets by vigorously espousing the cause The upshot was that, early in 1883, Congress passed a well conceived civil service measure[4]—patterned after an English order in council of 1870, and commonly known as the Pendleton Act—which, many times amended and greatly broadened, has from that day to this served as the fundamental law governing admission to the national civil service[5]

## PROGRESS AND PRESENT STATUS OF THE MERIT SYSTEM

In this epochal legislation, two main things were ordained (1) progressive classification of clerks and other employees—first in the Treasury and Post-Office Departments, and afterwards, as the president should direct, in other

[3] Notably the National Civil Service Reform League founded in 1881, renamed in 1945
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departments as well, and (2) restriction of appointments to all such classified positions to persons "among those graded highest" in open competitive examinations administered by a newly established civil service commission. At the outset, the reform did not extend far. In the first year, the number of positions affected did not exceed 14,000 out of a total of some 110,000. Gradually, however, it grew, in Washington and by extension also to some of the field services, so that by 1933, on the eve of Franklin D. Roosevelt's assumption of the presidency, it exceeded 450,000, or some 80 per cent of the entire federal service at that time. Much of the increase, of course, was [illegible] arising merely from the expansion of staffs in branches of the service [illegible] on the classified basis. Other gains flowed, however, from occasional acts of Congress placing specified groups of positions, whether new or old, [illegible] classified service,* *e.g.*, an act of 1902 classifying the employees of the Bureau of the Census, and still others from executive orders issued in pursuance of discretionary authority conferred in the Pendleton Act or in [illegible] statutes—as, for example, when President Cleveland brought into [illegible] service numerous positions in the internal revenue and railwa[y] and in the Department of Agriculture, or when President Theo[dore] brought in the rural free delivery employees and all fourth-cla[ss] north of the Ohio and east of the Mississippi. Perhaps chiefly [illegible] burdens which political appointments imposed upon them [illegible] heads of departments (far greater than in Jackson's day), th[ey] ways outran Congress in their desire to see the competitive sy[stem] Congress, indeed, the Civil Service Reform League bluntly [illegible] cently as 1937, was always the chief obstacle to progress.

The assertion is borne out not only by repeated failures of [illegible] when enacting legislation calling for additional appointme[nts] new positions in the classified service but by actual retrench[ment] Congress, or at any rate members hungry for spoils, must be [illegible] Every new presidential administration saw advances on some [illegible] treats on others—retreats forced on even such sterling fri[ends of the] principle as Presidents Cleveland, Wilson, and Hoover. Retr[eat] was, of course, heaviest at times when a party long out of [illegible]

[illegible]

mongers in Congress, abetted sometimes by heads [illegible] heart were primarily politicians, to push the merit sy[stem] positions.

Franklin D. Roosevelt's accession to the presider[ncy] the launching of the New Deal, opened the way fo[r]

[illegible] and by peop[le] [illegible]

dealt some particularly heavy blows The Democrats were back in power after 12 lean years, and the rank and file were hungry for offices Swift creation of new agencies of recovery and reform sharply multiplied positions to be filled And in the great majority of cases Congress exempted from the competitive system the hordes of new and transferred employees, leaving the way open for spoils at a juncture in the national life when such laxity was especially deplorable The President himself issued the first executive order on record withdrawing from the classified service positions (in the Bureau of Foreign and Domestic Commerce) placed therein by a predecessor To be sure, a few of the 60 or more new agencies created—notably the Tennessee Valley Authority and the Farm Credit Administration—decided of their own accord to operate in accordance with the merit principle But as a result of wholesale exemptions by statute, and of spoils raids in a good many of the older establishments as well the service as a whole so far slipped back that the proportion on a merit basis sank to hardly more than 60 per cent at the middle of 1936 An atmosphere developed in which the merit system was challenged and endangered as in few earlier periods of its history, indeed, in some states there were efforts to repeal merit laws outright

Renewed agitation for reform

Of course, things could not go thus badly without stirring protest Outside of government circles, the Civil Service Reform League, the Civil Service Assembly of the United States and Canada, the National League of Women Voters, and other organizations—and inside such circles, the National Legislative Council of Federal Employee Organizations and the Civil Service Commission—campaigned not only for a reversal of the trend, but for an extension of the merit system to include every non policy framing group or grade In 1937, the President's Committee on Administrative Management declared for extension of the competitive system, not only "upward and outward," but also "downward," so as to embrace skilled workmen and laborers, and in the same year, the President himself, who all along had assured the reformers that the system was in no danger at his hands and would be "extended and improved during his administration urged upon Congress that all except policy making positions be placed on a merit basis

A long leap forward—the Ramspeck Act (1940)

Notwithstanding this heartening turn of events, one would not have surmised at the opening of the second Roosevelt administration in 1937 that the merit system in the federal service was on the eve of its greatest triumphs Yet so it proved To begin with the President, in 1938, not only overhauled and modernized the existing civil service rules, but ordered into the classified service all previously exempt non policy determining positions—some 100,000 —over which he had the requisite power More important, Congress, in 1940 made up for a good deal of past dereliction by passing the Ramspeck Act[7] authorizing inclusion in the service, at presidential discretion, of *all* positions remaining exempt except those subject to presidential appointment with Senate confirmation and a few other limited groups, and in the following year, 182,000 were brought in by a single order Except in so far as Congress might weaken in the case of future groups, or withdraw existing ones, the way was

[7] 54 *U S Stat at Large* 1214

open for throwing the now fast widening boundaries of the *merit system* around substantially all of the federal service, aside, of course, from that portion appointed by the president and Senate, including officials having to do with making policy [8]

The merit system today

With the armed services, industry, and agriculture making unprecedented demands upon the country's labor force, the federal civil service could not have been raised during the defense and war effort of 1940 45 to almost four times its previous size without some relaxation of standards, and such there was, especially through great numbers of "war service' appointments based on only "pass" (as distinguished from competitive) examinations, and without classified status, although good for the duration of the war and for six months thereafter [9] Merit as a basis for appointment, however, was not abandoned, but only the standards for measuring it lowered, and with the crisis past, President Truman, in February, 1946, directed the Civil Service Commission to revert in all recruiting operations to the regular civil service rules, war service appointees eventually being dropped unless taking and qualifying under the usual competitive examinations The saving feature of the wartime let down was that it was dictated, not by partisanship, but solely by need for recruits, and in so far as its effects were deleterious they now have been pretty well liquidated It is true that the period was not without attempts to do the merit system direct injury by keeping particular official groups out of the classified service, or even by withdrawing others from it Most such efforts had only the effect, however, of showing how unremitting the fight to maintain and extend the merit system must be, and it is gratifying to be able to record that the net proportion of the service operated under the merit plan is today (1951) the highest on record—approximately 92 per cent with the president s power to push the figure upward still not entirely exhausted [9a] Considering how matters

[8] *A word may be inserted here about the special situation of postmasters Early in the* [illegible]

[9a] Following the exposures of [illegible] in 1951 President Truman has recommended the extension of the merit principle to the selection *of collectors of internal revenue*

stood less than a decade and a half ago, the situation marks an achievement of the first order in the quest for good government in this country

## METHODS AND PROBLEMS OF RECRUITMENT

A significant shift of emphasis

The primary object of the Pendleton Act and of the long line of later statutes and executive orders extending its provisions to additional groups of civil servants has been, of course, to promote appointment on a basis of demonstrated fitness and to assure appointees security of tenure during efficient performance and good behavior And these objectives, so far as they go, have been reasonably, although not completely, attained With the service, however, swelling to its present proportions and the work to be performed growing steadily in complexity, the view has developed that results thus far achieved beneficial as they are, have, after all, been only negative, *i e*, largely confined to eliminating spoils There remains, it is urged, the more positive and constructive task of attracting to the service a higher grade of personnel, surrounding public employment with conditions favorable to contentment and efficiency, and developing a genuine "career service", and with a view to accomplishing these purposes, experts propose a good many changes in present management and methods

Existing personnel agencies

1 The Civil Service Commission

To assist appointing authorities in finding persons qualified for places in the classified service, the Pendleton Act provides for a Civil Service Commission of three members, unattached to any executive department or other agency, and appointed by the president with the advice and consent of the Senate (for no fixed term) under the limitation that not more than two of the members may be 'adherents of the same political party" As time passed and conceptions of personnel administration broadened, the Commission's functions grew, until nowadays it is found not only framing and administering competitive examinations and certifying lists of eligibles (once considered its sole duty), but classifying civil servants, making rules and regulations, providing for in-service training, investigating charges of political activity, operating a civil-service loyalty program, enforcing an executive order of 1948 requiring 'fair employment' practices and procedures throughout the service, keeping service records reported by the establishments, administering the efficiency rating system and also the retirement law, and doing numerous other things pertaining to the upbuilding and improvement of the service With a view to correcting defects inherent in a board type of administration, managerial direction has since 1949 been concentrated in the president (former chairman), and under his supervision functions are performed by divisions such as personnel classification, examining and placement, retirement, loyalty review, service records, budget and finance, information, investigations, and inspection

For supervision over field civil service activities, including recruiting, there are, in principal cities throughout the country, 14 regional offices (each under a regional director) and also various branch offices, and the general field organization is completed by (1) some 700 'local boards," made up of post-

masters, collectors of revenue, and other national officers who as needed are called into special service by the regional director, without extra pay, and who, in approximately the same number of cities, from time to time hold "assembled," i e , group, examinations at first and second class post-offices (every such post-office has a board) or in other federal buildings, and (2) 712 'establishment,' "agency," or rating, boards within individual federal establishments or agencies, and concerned with recruiting, examining, and certifying applicants for professional, semi professional, technical, and administrative posts [10]

2 Other coordinating agencies

For the better management of their staffs, various executive departments and establishments began a good while ago to appoint personnel directors and other such officials of their own, and an executive order of 1938 prescribed, among other things, that henceforth a division of personnel supervision and management, under a director, and functioning in connection with appointing, rating, and promoting, be maintained in every department and major independent establishment, each director to be appointed, under the merit system, by the department or establishment head Still further to encourage coordinated attack upon personnel problems, these several agency directors, along with representatives of the Civil Service Commission and the Bureau of the Budget, and such additional persons as the president may name, are linked up in a Federal Personnel Council which in 1940 became a unit within the Civil Service Commission's organization

Examinations

With the exception of relatively few positions filled through non competitive, or "pass,' examinations 'classified' posts are filled only on the basis of competitive tests The Civil Service Commission's examining and placement division is in general charge But arrangements are made locally by the regional directors and their subordinates, dates and places are announced in newspapers and on placards displayed in postoffices and other public buildings, local examining boards conduct the tests and handle other details, and (except for scientific, technical, and professional positions) any citizen, regardless of educational or other qualifications, may compete, with no fee charged Candidates for the great majority of positions of a clerical or other subordinate nature are examined in groups, and exclusively in writing Those seeking positions calling for scientific, technical legal, or other special attainments, with emphasis on sound judgment and creative ability, are rated for experience, education, personality, and general fitness, not of course through formal examination, but by means of interview and testimony, perhaps supplemented by performance of some assigned task such as preparation of an original report or other paper In preparing tests, especially on the higher levels, examining bodies often enlist the aid of experienced government offi-

cials, and occasionally of academic and other outside experts These experts are also used to administer oral examinations [11]

Need for a new approach

Still in effect is the Pendleton Act's specification that examinations be "practical in their character" and, so far as possible, "relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed " At first glance, these requirements look reasonable enough As generally adhered to through the years, they, however, have had unfortunate consequences That they complicate the examination system by making necessary separate tests for a very great variety of positions is perhaps not too serious But genuine disadvantage arises from the low standards which they encourage Followed literally, they mean that a candidate's general attainments and capacity may be ignored, with his rating, and therefore his chance for appointment, determined entirely by the immediate fitness which he shows for performing the duties of a perhaps decidedly minor and routine job, and with the same limitation holding true also farther up the line, and the effect has been to crowd the service with people of no particular attainments yet able to edge their way in by "cramming up" on the requirements of some one given type of position

The British plan

At this point, it has been customary for observers to draw an unfavorable contrast between our system and the British In Britain, the competitive principle operates more consistently in the higher levels of the official hierarchy than with us, public service is looked upon to a greater extent as a profession, and even a career, and the main object of examinations is to recruit the service (especially in the middle and higher levels) from young men and women who expect to spend their lives in public employment, and whose education and native ability make it probable that they will rise from one grade to another and steadily grow in usefulness as administrators Hence, British examinations, even for the lowest ranks, are framed mainly with a view to broadly testing the candidate's general attainments and capacity

By and large, our American system still suffers from aiming no higher than at merely attracting recruits who can handle some particular and probably routine job—without regard for the mental acquirements and capacities that would fit a candidate, once appointed, to go on to larger responsibilities From as far back as 1934, however, the Civil Service Commission has been improving matters by setting up "registers" calling for examinations of general rather than specific nature and open only to graduates of colleges and universities, and it may be hoped that the newer plan of "weighting" examinations by taking into account factors of education and personal fitness, with appropriate adaptations to different levels, will in time spread throughout the service and redeem it from the mediocrity now too commonly found

Making appointments

On the "registers," or rosters, of the Civil Service Commission at Washington, in the offices of the regional directors, and in the files of the rating or

[11] During the fiscal year 1948 34 956 examinations were announced, 1 434 033 persons were examined, and 514 808 of those examined received appointment That so surprising a number of new appointments (evidencing an annual turnover of a quarter of the entire service) should prove necessary in an ordinary peacetime year is attributed by the Hoover Commission to a state of 'low morale calling for remedy *Personnel Management* (Washington 1949), 5

agency boards, are kept the names of all persons who have passed the respective examinations with a grade of 70 or above, classified by types of job Appointment, of course, withdraws a name from a list, and since 1939 the list itself, however many names of persons in waiting may remain on it, lapses at the end of a year—unless, as sometimes happens, the examining authority decides to prolong its life another year rather than order a new examination When a clerk or stenographer or other employee in the classified service is needed by an agency, the Commission (actually in about nine cases out of ten one of its regional offices, or for higher posts an agency or rating board) supplies the appointing officer with the names of three persons who stand highest in the appropriate lists of eligibles The officer normally appoints one of the three, and the other two resume their places at the top of the waiting list [12] If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for more names By way of a check, too, upon the judgment of the examiners and the appointing authority, every

he gains "civil service status," with all the security of tenure for which the law provides Removals during the probationary period are extremely few—fewer, one may add, than they should be

Veteran preference

The free working of the arrangements described is, however, obstructed by certain special provisions From as far back as the Civil War, honorably discharged, or retired, veterans, and wives or widows of such, have, under varying regulations, been eligible for civil service positions on terms easier than those applying to other people, and even before 1941 more than one-fifth of all new federal appointments went to "preference eligibles" on this veteran basis In anticipation of employment difficulties for discharged veterans after World War II, President Roosevelt, early in 1944, reaffirmed the general principle of civil service preference for ex servicemen, and, at his request, Congress passed an act not only giving veterans—whether or not they have seen active service—a monopoly of specified kinds of minor civil service jobs (as guards, messengers, etc ), and empowering the president, for five years after the war, to add to the list, but providing also for (1) arbitrarily adding 10 points to the earned examination ratings of honorably discharged ex servicemen and women with service-connected disabilities, wives of disabled ex-servicemen and unmarried widows of ex servicemen, (2) placing all such

persons whose earned rating plus preference is above 70 at the top of the appropriate registers ahead of all other eligibles, except in the case of professional and scientific positions with entrance salary of over $3,000 a year, and (3) adding five points to the earned examination ratings of honorably discharged ex servicemen and women not disabled, and giving such persons preference in appointments over all others rating equally high [13]

The idea that the nation should suitably compensate those who have risked their lives in its defense, and should take care of those who have incurred physical or mental injury in doing so, is sound From the point of view of good administration, it is however, unfortunate that we have fallen into the habit of discharging this obligation, not alone by pensions, "bonuses," hospitalization, and the like, but by permitting the civil service to be permeated with persons whose claim to some kind of compensation often is indisputable, but who can be edged into public positions (often over persons better qualified) only by disregarding considerations which clearly ought to govern when public employees are being selected The service promises for a good while to come, nevertheless, to be very heavily manned with veteran preference appointees (45 per cent of the total at work in 1948 and 55 per cent of all new appointees), capable and otherwise

Apportionment according to population

Another restriction arises from a requirement of the Pendleton Act which always has had a particular appeal for members of Congress with a weakness for patronage, namely, that as nearly as the conditions of good administration warrant,' appointments in the departments and independent establishments at Washington shall be apportioned among the several states and territories and the District of Columbia on a basis of population The rule is not applied in the case of veterans, and in any event it can be followed in only a rough sort of way, for the reason that eligibles from many Southern and Western states are not sufficiently numerous Even so, it is responsible for the appointment of many persons of inferior qualification

## DISCIPLINE, REMOVAL, PROMOTION

Discipline

The merit system was introduced not only to improve the methods of selecting civil servants, but also to provide greater security of tenure than ever is enjoyed under the sway of spoilsmen Opponents of the reform sought to discredit it by arguing that protected employees, feeling safe, would grow careless and inefficient There was no intention, of course, that such a result be permitted to follow, and while it probably is true that governments are, on the whole, more lenient with those who serve them in civil capacity than are private businesses with persons on their payrolls, the regulations applying to our national service (both classified and otherwise) contemplate full powers of discipline and removal—so long, in the case of the classified service (says one of the rules), as 'like penalties shall be imposed for like offenses and no discrimination shall be exercised for political or religious reasons" Every member of the service is liable to disciplinary action at the hands of some

[13] More or less similar arrangements prevail in 22 states

superior authority, and such action may vary all the way from mere reprimand to suspensions (not to exceed 70 days), reduction in rank and pay, and in extremer cases removal

Removals

For it must be observed that development of the merit system has in no wise abrogated the judicially established principle that the power to appoint normally carries with it the power to remove What the rules (statutory or otherwise) do is merely to afford merit appointees security against arbitrary and unreasonable removals, an immunity which officials outside of the classified service have no legal ground for claiming In the main, this protection consists in requiring that removals be made only—as the Lloyd LaFollette Act of 1912 puts it—'for such cause as will promote the efficiency of the service," that refusal to contribute time or money to a political party (or, on the other hand, making a contribution), or membership in a union [13a] or participating in a petition to Congress, shall in no case be ground for removal, and that removals shall in all instances be made in a manner essentially fair to the employee, fairness being construed to require that the employee be furnished with a written statement of the charges against him and that he be allowed reasonable time in which to make a written reply, with affidavits, but with no right to an oral hearing or of appeal to any court [14] Within the limits thus fixed, an appointing authority (usually the head of a department) may sever from the service any person under his jurisdiction whom he judges to be negligent, incompetent, dishonest, or otherwise a hindrance to good administration As many as 100 000 civil servants have been known to be removed in a single year Nevertheless there is reason to believe that a task usually distasteful sometimes is performed too sparingly

The troublesome matter of loyalty

A reasonable requirement of any civil servant is, of course, that he be loyal not only to his superiors, but to the government which he serves Formerly, such loyalty was, in general, taken for granted Even before World War II, however, subversive elements so multiplied that Congress deemed it expedient—in the Hatch Political Activities Act of 1939—to debar from federal employment any person belonging to a political party or other organization advocating the forceful overthrow of our constitutional form of government By 1941, federal appropriation acts sometimes carried clauses forbidding any salary or wage to be paid to such a person And, with subversive influences and activities still a source of deep concern in postwar years, President Truman, in 1947, with congressional backing instituted an all round program aimed at keeping the service free from appointees about whose loyalty there could be any reasonable doubt

The *present* loyalty program

First of all, the attorney general was instructed to prepare and keep up to date a list of organizations throughout the country known to be subversive or to have objectives rendering any member or affiliate an object of suspicion A loyalty check of the entire existing service (in so far as not previously checked) then was made by the F B I, with 99 5 per cent given a clean bill

[13a] Unless such membership involves the obligation to strike against the government.
[14] A hearing may nevertheless be allowed as a matter of grace and veterans have special rights of appeal to the Civil Service Commission

of health And finally—with the F B I continuing to check all new appointees and applicants and furnish information obtained—machinery was created for hearings and determinations wherever F B I investigations raise doubts In the national capital, this machinery consists of three-member "agency boards" in the appropriate departments and establishments, elsewhere throughout the country it takes the form of "regional loyalty boards" consisting chiefly of lawyers and political scientists, organized by the Civil Service Commission in the various civil service regions, and operating through three-member panels—with appeal in all instances to a 26-member Loyalty Review Board operating also mainly through panels and under responsibility to the Commission in Washington Incumbents found disloyal, or concerning whom 'reasonable doubt' remains after hearings (and review if requested) are subject to dismissal on recommendation of the Commission, and applicants similarly situated are practically certain to be declared ineligible [15]

Admittedly, the program as quietly pursued by the designated authorities presents many problems and difficulties, and although the courts have consistently upheld its constitutionality, the American Civil Liberties Union and other organizations and individuals have criticized it sharply In point of fact, however, suspected persons are afforded benefits of hearing, counsel and appeal which they previously did not enjoy, and the observation of one of the authors of this book who served on a regional board is that the 'benefit of the doubt" is so freely extended that actions taken are likely to err on the side of leniency rather than otherwise [16] At all events, a remarkable new feature has been added to our civil service practice

Immunity from partisan pressures

Included in the protection thrown around members of the classified service is immunity from pressures of a partisan nature By terms of the Pendleton Act, no classified officer or employee may be solicited for political funds by a congressman, senator, or federal office-holder—or indeed by any person whomsoever within a building used by the federal government There is nothing to prevent such solicitation by non-office-holders, so long as they do not invade a government building for the purpose, and sometimes officers and employees are in this way practically coerced into making contributions No one, however, may be removed, demoted, or even threatened, by his superior either for making or refusing to make a political contribution

Restraints upon partisan activities

In return, members of the service—although, of course, permitted to vote,[17] and likewise to give private expression to their opinions on political matters—are required to abstain from activities of a partisan character From

[15] During the year ending June 30, 1950 [illegible] orable to

1907, a rule, based on an executive order, has forbidden members of the classified service to take any "active part in political management or in political campaigns" And as construed by the Civil Service Commission, the regulation debars them from membership in party conventions, addressing party gatherings, participating in the preparation of party resolutions or platforms, serving on party committees assisting in getting out the voters on election day, *serving as election officers, distributing campaign literature or emblems,* arranging party meetings or demonstrations publishing anything in the interest of a particular candidate or party, and a long list of other activities having a partisan aspect—although not including mere passive attendance at party *meetings* or making contributions to party funds through persons not connected with the federal government And, although the Commission (itself without power to remove any one having civil service "status"[18]), long complained that infractions which it looked into and reported frequently were ignored by the authorities having power to remove, partisan abuses traceable to federal civil servants in times past must in the main, be laid at the door, not of the classified service, but of that portion of the service remaining on a political basis

The Hatch Act of 1939

To meet this situation Congress in 1939, passed the Hatch Political Activities Act,[19] designed to prevent pernicious political activities" on the part, not only of classified federal employees but of *all* such employees, *except only those occupying policy determining positions* Restrictions upon soliciting political contributions from classified civil servants were not made applicable to the unclassified But aside from this all officers and employees in the service, classified and unclassified alike are forbidden to take any active part in political management or political campaigns, or to use their official authority with a view to influencing in any way the election or nomination of any candidate for office

Amendments of 1940

When approving this legislation, President Roosevelt called attention to the fact that it applied to officers and employees of the federal government only, and recommended that it be extended to cover 'state and local government employees participating actively in federal elections' As a result an amending act of 1940[20] now forbids any employee of a state or local government, if engaged wholly or principally in a federally supported activity, (a) to use his official authority or influence for the purpose of interfering with any federal nomination or election (b) to coerce, command, or advise any *other such employee to make a political* contribution or loan, or (c) to take any active part in political management or a political campaign Not so long ago, the number of persons affected by legislation of this character would not have been large Embracing however, all personnel concerned to any

[18] Except its own employees A widespread impression that the Commission has general power to dismiss civil servants is erroneous Employees admitted temporarily and for any

extent with carrying on federally assisted state and local activities under the grant in-aid system, it nowadays runs into the hundreds of thousands The consequences in states dominated by patronage appointments have been great

To regard either the foregoing or any other "clean politics" legislation as capable of completely eliminating "pernicious political activities" would, of course, be naive, and, not only have there been violations of the new laws, but efforts have several times been made to weaken them by qualifications and exemptions In general, however, their effect has been salutary

Promotion and transfer

In the business and professional world, it is recognized that nothing contributes more to the efficiency and morale of a staff than reasonable assurance of advancement in rank and pay, not according to mere seniority, but under flexible arrangements placing a premium on meritorious service The same holds true in public administration, even though the fact has not always been so clearly perceived Few problems of our American civil service (national state, and local) have proved more difficult Upon what qualities or attainments should promotion be based? How are these qualities or attainments to be measured? Should promotion be by formal examination, on the basis of efficiency ratings or simply according to someone's judgment? Should higher positions in a given branch of the service be filled only by promotion, or also by initial appointment from the outside? In the Pendleton Act we read that no classified officer or employee shall be promoted "until he has passed an examination, or is shown to be specially exempted from such examination', and a rule long ago laid down by the president enjoins that "competitive tests or examinations shall, as far as practicable and useful, be established to test fitness for promotion in the classified service" Both regulations obviously recognize the possibility of promotions without examination, and until within the past decade, while examinations were employed more or less irregularly, the selection of persons for advancement, in the staffs at Washington as well as throughout the country, was commonly at the discretion of administrative chiefs, guided in so far as they chose by such efficiency ratings as might be available

An executive order of President Franklin D Roosevelt in 1938, however, tightened up the procedure considerably The Civil Service Commission was instructed to work out and put into operation a general service-wide promotion system, and since that time the Commission itself has been conducting a good many promotion examinations for positions common to more than one department or establishment Under supervision of the Commission's examining and placement division, individual departments and establishments, furthermore, have been holding examinations for promotions within their respective jurisdictions And the Commission's direct examinations open avenues not only for simple promotions, but also for transfers (often amounting to promotions) from one branch of the service to another Efficiency records, too, are kept more systematically than formerly, with ratings reviewed in every department and establishment by a board of review (composed of one member appointed by the Commission, one by the agency head, and one by the employees) and reported in full to the Commission In practice, promotions

are likely to be determined by the results of examinations, checked against candidates' efficiency ratings [21]

## CLASSIFICATION, PAY, RETIREMENT

Earlier conditions

Thirty or forty years ago, the federal civil service was a vast, sprawling aggregation of positions and jobs of 2,200 recognized types almost totally lacking in coordination In certain departments, there was a scheme of classification, to the end that persons performing duties of similar difficulty and importance should receive similar pay, [22] other departments had quite different schemes, or virtually none at all, and throughout the service as a whole, persons doing the same kind of work equally well often received quite different pay, holders of superior positions in one department or agency receiving less than inferiors in another, and women usually paid less than men for doing the same kind and amount of work Examinations, too, could be only hit or miss, rather than correlated with the duties of service wide categories of employees Today, it seems elementary that the only way in which a great force of public employees can be brought into orderly array and dealt with according to plan is to group them by function, and across the board' without regard to department or agency, into classes or categories, so that appropriate examinations may be devised for each group or sub-group and compensation fixed on a corresponding graduated scale Not until 1923, however, was this accepted in the federal government as a principle of action, and only today is it being carried into full effect

Classifications of 1923 and 1949

The reform started with that portion of the service operating in the District of Columbia, where a Salary Classification Act of 1923, grouping into classes all positions involving the same types of work, and assigning appropriate salary ranges to each grade or class, with equal pay for men and women, put into operation a scheme of five classes or 'services" (each subdivided into grades) as follows [23]

1 Professional and scientific service
2 Subprofessional service
3 Clerical, administrative and fiscal service
4 Crafts, protective and custodial service
5 Clerical mechanical service

The intention was that the plan be extended to federal employees throughout the country, and some progress in that direction was made Obstacles and delays, however, were encountered, and before the task could be completed, growing dissatisfaction with the rigidity and arbitrariness of the five fold grouping led to repeal of the 1923 statute and enactment of a new law—the

individual classification systems

Classification Act of 1949—substituting simply two classes, or 'compensation schedules' each duly subdivided into grades, and with provision that thenceforth it should be the duty of each department and agency to work out for itself, under supervision and review of the Civil Service Commission a classification of all its personnel the country over, in accordance with the general scheme prescribed Under the new arrangement, a General Schedule (GS) consolidates the first three of the former classes, now organized in 18 grades and a Crafts Protective, and Custodial Schedule (CPS) brings together the other two arranged in 10 grades The entire plan, with initial annual pay and step increases in the various grades, looks as follows [24]

COMPENSATION SCHEDULES UNDER THE CLASSIFICATION ACT OF 1949

| Grade | *Initial Pay per Year and Step Increases (in dollars)* | | | | | | |
|---|---|---|---|---|---|---|---|
| GS 1 | 2 200 | 2 280 | 2 360 | 2 440 | 2 520 | 2 600 | 2 680 |
| GS 2 | 2 450 | 2 530 | 2 610 | 2 690 | 2 770 | 2 850 | 2,930 |
| GS 3 | 2 650 | 2 730 | 2 810 | 2 890 | 2 970 | 3 050 | 3 130 |
| GS 4 | 2 875 | 2 955 | 3 035 | 3 115 | 3,195 | 3 275 | 3 355 |
| GS-5 | 3 100 | 3 225 | 3 350 | 3 475 | 3 600 | 3 725 | 3 850 |
| GS 6 | 3 450 | 3 575 | 3 700 | 3 825 | 3 950 | 4 075 | 4,200 |
| GS 7 | 3 825 | 3 950 | 4 075 | 4 200 | 4 325 | 4 450 | 4 575 |
| GS 8 | 4 200 | 4 325 | 4 450 | 4 575 | 4 700 | 4 825 | 4 950 |
| GS 9 | 4 600 | 4 725 | 4 850 | 4 975 | 5 100 | 5 225 | 5 350 |
| GS 10 | 5 000 | 5 125 | 5 250 | 5 375 | 5 500 | 5 625 | 5 750 |
| GS 11 | 5 400 | 5 600 | 5 800 | 6 000 | 6 200 | 6 400 | |
| GS 12 | 6 400 | 6 600 | 6 800 | 7 000 | 7 200 | 7 400 | |
| GS 13 | 7 600 | 7 800 | 8 000 | 8 200 | 8 400 | 8 600 | |
| GS-14 | 8 800 | 9 000 | 9 200 | 9 400 | 9 600 | 9 800 | |
| GS 15 | 10 000 | 10 250 | 10 500 | 10 750 | 11 000 | | |
| GS-16 | 11 200 | 11 400 | 11 600 | 11 800 | 12 000 | | |
| GS 17 | 12 200 | 12 400 | 12 600 | 12 800 | 13 000 | | |
| GS 18 | 14 000 | | | | | | |
| CPC 1 | 1 510 | 1 570 | 1 630 | 1 690 | 1 750 | 1 810 | 1 870 |
| CPC 2 | 2 120 | 2 190 | 2 260 | 2 330 | 2 400 | 2 470 | 2 540 |
| CPC 3 | 2 252 | 2 332 | 2 412 | 2 492 | 2 572 | 2 652 | 2 732 |
| CPC 4 | 2 450 | 2 530 | 2 610 | 2 690 | 2 770 | 2 850 | 2 930 |
| CPC 5 | 2 674 | 2 754 | 2 834 | 2 914 | 2,994 | 3 074 | 3 154 |
| CPC 6 | 2 900 | 2 980 | 3 060 | 3,140 | 3 220 | 3 300 | 3 380 |
| CPC 7 | 3 125 | 3 225 | 3 325 | 3 425 | 3 525 | 3 625 | 3 725 |
| CPC-8 | 3 400 | 3 525 | 3 650 | 3 775 | 3 900 | 4 025 | 4 150 |
| CPC-9 | 3 775 | 3 900 | 4 025 | 4 150 | 4 275 | 4 400 | 4 525 |
| CPC 10 | 4 150 | 4 275 | 4 400 | 4 525 | 4 650 | 4 775 | 4 900 |

The problem of pay

The foregoing schedules of pay represent simply the levels reached in 1949 and 'frozen" in the legislation of that year Even when adopted, they, of course, were not viewed as permanent In our fluctuating economy, no scheme of the kind can be so regarded Within two years (July, 1951), indeed, President Truman was found asking Congress for a 7 per cent pay increase for substantially the entire service with the Senate post office and

[24] The step-increases normally come at the end of each year of service assuming an efficiency rating of good When the top is reached in a given grade increased compensation can be obtained only by promotion to a higher grade

civil service committee evincing willingness to go as high as 8 8 per cent, and in the end, an increase of approximately 10 per cent, with a minimum rise of $300 and a maximum of $800, was authorized by the Congress

Traditionally, civil servants in the lower levels have been paid rather better than persons of comparable status in private employment, and they have the further advantage of greater likelihood of being able to stay on In the higher brackets, pay always has been distinctly below that in private business—in the case of most supervisory and technical posts, far below, and the service often has suffered from resignations of capable administrators lured away by higher salaries outside No one expects the government to attempt to match the upper-bracket salary scales of great banks and industrial establishments, for administrative talent in the higher levels, it necessarily must rely on the desire or willingness of capable men and women to serve the country in public capacity with no regard for the salaries that they might command in private establishments At the intermediate levels and downwards, however (so long, at least, as pay scales in private employment are not pushed too far upwards), increases since World War II have given the government at least a slight competitive advantage over private employers Such increases, too, have bolstered morale by stimulating in the rank and file of federal personnel a sense of working for a considerate and fair employer

Retirement and pensions

Under any practicable scale of compensation, the great majority of civil servants cannot be expected to put aside much for a rainy day—still less to provide in any adequate manner for old age, and the only satisfactory way of enabling them to be separated from the service after they have reached a point of diminished usefulness, without becoming dependents or public charges, is to make them beneficiaries of a system of retirement pensions [25] From early in the country's history, Congress has been generous, and sometimes prodigal, in pensioning war veterans and their dependents On the other hand, it did not get around to making provisions for civil service pensions until some 30 years ago Under a Civil Service Retirement Act of 1920 (several times amended), however, we now have a compulsory, contributory pension system applying originally to members of the classified service only, but later extended to substantially all of the unclassified service as well,[25a] unless otherwise provided for Under the normal arrangement, 6 per cent of the salary or other pay of any person covered is deducted, as the "retirement and disability" credit accumulates, the government adds to it interest compounded annually at 3 per cent, and from the fund thus built up the retired employee receives an annuity in a form and on a scale determined by law The beneficiary may, if he likes, pay in more (up to 10 per cent of his salary), assuring himself a larger annuity Under the regular arrangement, however, his annuity since 1948 (if his best five years' pay averaged $5,000 or more) is one-half of one

[25] A fe[illegible] some co[illegible]nt es and many cities have established such systems By failing to

[illegible]

federal judiciary

per cent of salary multiplied by years of service, or (if his salary average was less than $5,000), it is one per cent of salary plus $25 multiplied by years of service In any event, the system gives beneficiaries reasonable assurance against dependency in ill-health and old age, and brings the United States abreast of other countries in making provision for the multitude of men and women who spend their lives doing the government's routine work, many of them with little or no prospect of promotion or other betterment [26]

## THE ORGANIZATION OF FEDERAL EMPLOYEES

The right to organize conceded

As the country's largest employer, the national government encounters questions of labor relations and labor policy not unlike those confronting private industry, and among these are problems raised by the unionizing of civil servants for purposes of collective action Organizations of federal employees started, in the postal service, some 80 years ago, and after considerable controversy over the tactics of some of the unions in pressing for higher pay, the Lloyd-LaFollette Act of 1912 clarified matters by (1) recognizing the right of all federal employees to petition Congress or any member thereof (in effect to lobby), (2) by guaranteeing that membership in employee organizations designed to improve working conditions should not be made a reason for dismissal or demotion, and (3) by conceding the full right of such organizations to affiliate with labor unions outside of the public service, so long as not entailing any "obligation or duty to engage in any strike or to assist in any strike against the United States"

Existing unions and federations

In the last 30 years, the unionizing of federal employees has gone forward rapidly

1 Ten different groups of postal workers now have their own separate nationwide organizations (five affiliated with the A F of L and five unaffiliated), enlisting in some instances as much as nine-tenths of their potential strength

2 A National Federation of Federal Employees, dating from 1917, wholly independent, and recognized as unusually conservative, links up some 1,100 local unions of federal employees, composed of persons engaged in various services outside of the separately organized postal branch

3 An American Federation of Government Employees originating in a secession from the National Federation in 1932 and affiliated with the A F of L, has grown fast, especially among employees of agencies of New Deal antecedents

4 A United Public Workers of America (with which a United Federal Workers of America has been merged) formerly was affiliated with the C I O, but was expelled because (according to report) of its leftist leanings and is in decline

5 Notwithstanding the opinion of many people that such relationships should not be permitted thousands of employees engaged in mechanical trades, *e g* printers, carpenters and plumbers, belong to the regular unions maintained by their privately employed fellow craftsmen

Naturally, the service associations are concerned first of all with salary scales, hours, retirement rights, and other matters pertaining to the status of their own members, and undoubtedly they have helped secure better working conditions for many groups of employees. Of course the demands which they make sometimes seem out of line with the public interest, and hence stir resentment. Some people, indeed, fear that they will grow powerful enough to hold a club over the government, threatening paralysis of its activities unless they get what they want. In the long run, however, they have an interest, not only in promoting the general efficiency of the service to which they belong but in keeping the public favorably disposed, and as a rule they can be counted upon to support merit principles, promote employee morale, and help raise the quality of work performed by their members. The things for which they are most frequently criticized are their lobbying activities in Washington, their occasional excursions into politics, and their relations with labor organizations outside of the service—although in fairness it must be added that the no-strike pledge contained in the constitutions of most of the number has been kept faithfully and our government consequently spared defiance of its authority by its own regular employees.[27]

Pros and cons of employee organization

## TRAINING FOR THE PUBLIC SERVICE

At one time, George Washington dreamed of a national university that would train young men for the federal service, and often afterwards an institution was suggested that would do for the civil service what the academies at West Point and Annapolis do for the Army and Navy. Nothing of the kind has been provided; in the days of the spoils system neither the politicians nor the people for whom they got jobs would have had any interest in such facilities, and with the service as large as it is nowadays and its activities as varied as they have come to be, no single training establishment could go far toward serving the purpose. Under a merit system the need for training—at least for admission above the clerical grades—none the less is fully recognized, and fortunately it is met today, in considerable measure, by the opportunities provided in colleges and universities (besides many professional and other more or less specialized schools) in every part of the land. The most basic preparation thus afforded commonly takes the form of courses on the principles and techniques of public administration in general, supplemented often with courses treating more particularly of administration in states or cities, and perhaps courses on such cognate subjects as administrative law. And for the candidate of serious purpose, a general grounding of this character is useful, if not indispensable. When, however, he confronts his examination for

Pre-service

[27] The Labor Management Relations [Taft-Hartley] Act of 1947 (see pp. 463-467 below) [illegible]

entrance into the service, he will find himself tested, not on administrative theory, but on one or more concrete subjects germane to the kind of employment he seeks, i e, accounting, statistics, taxation, public health, forestry, some branch of law or of engineering, and the like, and persons responsible for training and guiding young people in academic institutions for entry into public service are now wisely directing their work far more than formerly into such substantive fields Particularly is this true in the lengthening list of institutions in which special programs have been organized and facilities provided

In service

In many branches of the federal service, too, one's systematic training need not stop upon appointment Just as most large private establishments provide their employees with opportunities for continued training, with a view to increasing their efficiency and preparing them to assume larger responsibilities, so there have been developed in various departments (notably Agriculture) and agencies in Washington extensive facilities for "in service" training for personnel officers, income-tax officials, and other groups[28] And for serious-minded persons weighing the pros and cons of entering upon a civil service career, the prospect of having opportunity, after entrance, to obtain training strengthening their chances of advancement is often an added inducement

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[28] In-service training for government employees is provided also by educational institutions in various metropolitan centers

# CHAPTER 23

# The National Judiciary

*Reasons for a separate system of national courts*

The Articles of Confederation left all judicial interpretation and enforcement of the acts of the Congress and its agents to the courts of the several states, and unhappy consequences led many people to Alexander Hamilton's conclusion that "want of a judiciary [*i.e.* national judicial] power" was the feeble system's crowning defect. Every design for an improved government offered at Philadelphia in 1787 proposed some remedy, and in planning a "more perfect union" the framers of the new constitution not only asserted in the preamble their purpose to "establish justice," but made judicial power coordinate with executive and legislative powers and opened the way for a system of national courts both separate and complete within itself. If the new constitution and the laws and treaties made under it were to be "supreme law," it was essential that they be interpreted and applied throughout the country in a uniform manner, and the only means of assuring this was a set of courts linked with the same central authority that made the laws and treaties in the first place—including at the top a single national court paramount to all other such courts and to the highest courts of the states as well. Only in this way, too, could settlement of conflicts between national power and state power be provided for, as well as disputes—already for a good while troublesome—between states themselves.

*The constitution's judiciary article*

Thus reasoning, the constitution's makers wrote into the document the third, or "judiciary," article, leaving much for later decision (including the extent to which the hierarchy of state courts should be paralleled by a hierarchy of federal courts), but vesting the new federal judicial power in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." With remarkable conciseness and lucidity, the article also indicates the nature and scope of this judicial power—a matter with which our study of the federal judicial system may appropriately begin.

## SCOPE OF THE FEDERAL JUDICIAL POWER

*Grounds of jurisdiction*

In the field of justice, as everywhere else, the national government has only delegated and limited powers; federal courts have jurisdiction, *i.e.*, power of hearing and deciding, over only those classes of cases enumerated or (more often) implied in the constitution, while the state courts have juris-

diction over all others As a glance at the judiciary article will show, the federal judicial power extends to some cases because of the nature of the matter in controversy, and to others because of the status or residence of the parties concerned Included in the first category are (1) all cases in law and equity arising under the national constitution, (2) all arising under federal laws and treaties, (3) all admiralty and maritime cases Whenever, in any lawsuit, an asserted right is based upon some provision of the national constitution laws or treaties, or when it is alleged that some right secured by any of these has been violated by some enactment in a state law or municipal ordinance the case may be commenced in, and decided by, a federal court, or, if commenced in a state court, it may, before final decision, be transferred to a federal court In other words, whenever it becomes essential to a correct decision of a lawsuit to interpret or apply the national constitution laws, or treaties, the case comes within "the judicial power of the United States' Cases of admiralty and maritime jurisdiction," also falling in this category, have to do with offenses committed on shipboard, and with contracts which by their nature must be executed partly or wholly on the high seas or 'navigable waters of the United States"

1 Nature of the subject *matter*

2 Status of the parties

The second class of cases comes within the scope of the federal judicial power because of the status of the parties, and includes (1) all cases affecting ambassadors and other public ministers and consuls, (2) controversies to which the United States is a party, (3) controversies between two or more states, (4) controversies between citizens of different states, (5) disputes between citizens of the same state claiming lands under grants from different states (no longer an important matter), and (6) controversies between an American state or its citizens and a foreign state or its citizens or subjects [1]

Exclusive or concurrent jurisdiction?

The mere fact, however that certain classes of cases are indicated in the constitution as falling within the judicial power of the United States does not necessarily mean that they are thereby wholly removed from the jurisdiction of the state courts, because the constitution gives the federal courts no *exclusive* jurisdiction whatsoever Congress alone determines what classes of cases shall be handled exclusively by the federal courts, and all others may be tried in state courts as well Under existing national statutes the federal courts have *exclusive* jurisdiction over (1) all civil actions in which the United States or a state is a party, except those between a state and its own citizens, (2) all suits affecting foreign diplomatic and consular officials, (3) all cases involving crime against the United States, and (4) all admiralty, maritime, patent-right, copyright, and bankruptcy cases arising under either the national constitution or national statutes Over practically all other kinds of cases to which the

*perhaps even sought* But even this is done only in connection with actual controversies

federal judicial power extends, federal and state courts have *concurrent* jurisdiction, with the party instituting a case (the plaintiff) enjoying the option of commencing his action in a court of his own or the defendant's state, or of bringing it in a federal court, but with the defendant entitled in certain circumstances to have it removed from a state to a federal court

How cases get into the federal courts

The existence at all times of thousands of cases on the dockets of the federal courts may be accounted for in one or another of three different ways Many are cases begun and ended in a federal court because that is the only forum in which they can be tried at all Others have been commenced in a state court, but have been transferred, at the request of the defendant, to a federal court to be finally disposed of there Such removal is permissible (a) when the parties reside in different states and the defendant is not a citizen of the state in which the action is brought and (b) when, even though they reside in the same state, the case raises a federal question '—in other words involves some right or immunity claimed under the national constitution, laws, or treaties In either event, the removal must take place before the state court has begun to try the case, and the purpose may be to place the defendant on an equal footing with the plaintiff (who may have had a choice between the federal and state courts when he brought his suit), and especially to protect the defendant against the effects of local prejudice Lastly, cases get into the federal courts as

holds a treaty or a federal statute invalid, the case may be carried on appeal *to the federal Supreme Court In all other cases decided by state courts in*volving federal questions, the defeated party has no *right* of appeal He may carry his case to the Supreme Court only if the Court is willing to hear it, *i e*, by a process known as *certiorari* [2]

## KINDS OF CASES TRIED

1 Criminal

Cases appearing in the federal courts in one or another of the ways mentioned fall into two broad categories (1) criminal prosecutions of individuals or organizations by the government and (2) civil suits or actions between private parties (occasionally a government agency and a private party), with the government merely providing the facilities necessary for conducting proceedings in a regular and legal manner With scant exceptions, both kinds of *cases are handled by the same courts*

(a) Definition of federal crimes

Under the legal systems of the states, many criminal offenses are such by common law, and persons committing them are prosecuted on that basis In the federal field, on the contrary, there are no common law offenses, all crimes are defined and penalties fixed by Congress, under authority derived directly or indirectly from the constitution Direct authorization is found

[2] *Certiorari* is a form of writ or order by which a higher court calls upon a lower one to "certify" or turn over a given case to it with *all the records A litigant may petition a court to* take such action but the court has full discretion in the matter In this way the Supreme Court reserves its time for cases which involve important principles of constitutional interpretation.

in the case of only five classes of offenses, namely (1) piracies and felonies committed on the high seas, (2) offenses against the law of nations, or international law, (3) counterfeiting the securities and current coin of the United States, (4) treason against the United States, and (5) offenses committed in the District of Columbia, in any other place wholly under national control (such as a fort or an arsenal), or in the territories and dependencies And if the criminal dockets of the federal courts contained only cases falling within these five categories federal criminal jurisdiction would be rather unimpressive The fact is however that Congress has power to add indefinitely to the list Nothing indeed, is more natural and proper, when enacting a law, than to declare any violation of it a criminal offense and fix a penalty, and congressional legislation abounds in such provisions The power to establish post-offices, for example logically carries with it power to make it a crime to rob the mails In 1934, in fact, Congress invoked its authority over interstate commerce to extend federal criminal jurisdiction even to cases initially falling to the state courts but assuming a federal aspect by reason of the flight of persons involved, *e g* kidnappers, from one state into another

(b) Criminal procedure

All courts operate under rules of procedure covering such matters as the nature of evidence, the use of juries, and appeals, and in the case of the federal courts the constitution leaves all such rules to be made by or under the authority of Congress except in so far as the constitution itself touches the matter [3] For procedure in civil cases, the constitution goes no farther than to require trial by jury when the amount in controversy exceeds $20 On procedure in criminal cases, however, the first 10 amendments contain a number of provisions designed to surround accused persons with safeguards against arbitrary and irregular prosecutions—provisions carried over largely from the English common law and in several instances embodied in the English Bill of Rights of 1689 No civilian, for example, may be put to trial for a federal offense (except a misdemeanor) unless he has been indicted by a grand jury, nor be compelled to testify against himself, nor be deprived of life, liberty, or property without due process of law Persons accused of crimes are entitled to a speedy and public trial by an impartial jury,[4] to a trial in the vicinity where the crime was committed, in order to facilitate obtaining witnesses to be furnished with an exact copy of the indictment, to have witnesses subjected to cross examination in their presence, to have compulsory process for obtaining witnesses, to have the assistance of counsel, and to be admitted to bail in a reasonable sum, pending trial Furthermore, no person may again be subjected to trial in a federal court for the same offense if he has once been acquitted on the charge in such a court The same offense however, may be punishable by state authorities in the state courts—as, for example, in

[3] Congress began laying down rules in the Judiciary Act of 1789 and in later days added to or amended them as they accumulated The work however—grown increasingly technical—can more appropriately be performed by experienced jurists than by the ordinary run of legislators and in recognition of this power to make rules governing civil procedure has several times been delegated to the Supreme Court and in 1940 power to makes rules for criminal procedure also In formulating rules for both civil and criminal procedure, the Court relies heavily on advisory committees consisting of eminent lawyers and jurists

[4] The right to trial by jury does not extend to petty offenses and under certain circumstances may be waived even in felony cases See Adams v United States 317 U S 269 (1942)

cases involving passing counterfeit money, in cases of fraud when use has been made of the mails, and in cases of theft from freight-cars moving in interstate commerce The fact that a person has been successfully prosecuted for such an offense in a state court is no bar to prosecuting and convicting him in a federal court, for in such instances the defendant is being tried in different jurisdictions for offenses against different sovereignties, the state and the nation

2 Civil

(a) Cases at law

A second and more numerous category of actions tried in the federal courts embraces cases of a civil nature, and on the basis of the law administered, three distinct types must be distinguished—cases at law, cases in equity, and admiralty cases Cases at law comprise mainly actions arising out of civil wrongs, called torts and actions based upon contracts, either express or implied They rest upon some principle of common law, or upon some state or federal statute, and they are tried in accordance with the rules of the English common law, or modifications thereof introduced by state or federal statutes In most actions at law, the redress sought is money damages, and the remedy is granted only after the wrong has been committed or the contract has been broken Sometimes, however, money damages is an inadequate remedy The defendant may refuse to pay the judgment obtained against him, and have no property which can be seized and sold to satisfy the judgment Or it may be impossible to estimate the amount of damages resulting from non fulfillment of an agreement In still other cases, a contract may be involved —for example, a deed conveying title to real estate—which is perfectly regular and legal on its face and executed with due formality, although the circumstances surrounding its execution have been tainted with fraud, intimidation, or undue influence

(b) Cases in equity

In order to do "equity," or "substantial justice," in situations such as these, an 'equity jurisdiction" has been built up through the centuries in Anglo-American jurisprudence as a supplement to the usual law remedies Industrial strikes often result in destruction of property, or other injury, for which no adequate money damages can be collected, at all events, regular legal action can do nothing more than make awards after the damage has been done In equity proceedings, however, a federal court may, by issuing a writ of injunction,[5] command strikers and their sympathizers to refrain from injuring or destroying property, thereby preventing damage from taking place And any violation of the terms of an injunction constitutes contempt of court, which may be punished severely and summarily by the court whose jurisdiction has been disregarded Again, when it is impossible to estimate the amount of damages that might result from a breach of contract, as when the owner of a race horse has agreed to sell that horse—the only one the purchaser wants —a court, in equity proceedings, will, by a decree of 'specific performance," order the owner to carry out the agreement In a third type of cases, a court, in equity proceedings, may entirely set aside a deed for the transfer of property

[5] An injunction is a writ issued by a court (federal or state) commanding a person a group of persons or a corporation to do or to refrain from doing certain acts described in the document

on the ground of fraudulent or other improper circumstances surrounding the execution of the instrument [6]

(c) Admiralty cases

Lastly, the same federal judges who administer common law and equity also administer admiralty and maritime law in cases of tort and contract connected with shipping and water-borne commerce on the high seas or "navigable waters of the United States" Such cases are tried and determined in accordance with the highly technical and peculiar rules of an admiralty code inherited from England and modified by acts of Congress In prize and piracy cases, the judges sitting in admiralty courts also administer international law

## THE SYSTEM OF COURTS

Two general types

1 Constitutional

Federal courts in the United States fall into two categories, *i e*, constitutional and legislative The constitutional category is so called because the three levels of tribunals contained in it—district courts, courts of appeals, and Supreme Court—are established under the constitution's judiciary article, wield the national judicial power for which that article provides, and together form the "federal judicial system" To be sure, all of the courts named are created, and except in the case of the Supreme Court their jurisdictions exclusively defined by Congress—in statutes starting with the Judiciary Act of 1789, still the basic law underlying the system But the edifice is based squarely on the constitution, and the tribunal crowning it is expressly made mandatory by that instrument

2 Legislative

Legislative courts, too, are created by Congress, but under authority implied in constitutional clauses outside of Article III, such as those conferring power to tax and to govern territory Examples include the courts in territories like Alaska and Hawaii and in the District of Columbia, [7] a Court of Claims in which claims against the federal government are adjusted, a Court of Customs for settling disputes over tariff duties, a Court of Customs and Patent Appeals, a Tax Court instituted by the Revenue Act of 1942, and a Court of Military Appeals dating from 1950 All judges in constitutional courts are appointed by the president with the advice and consent of the Senate, hold office during good behavior, and are removable only by impeachment [8] Judges in legis

lative courts, on the other hand, while similarly appointed, almost always serve only for fixed terms (usually four years in the territories) and in all cases can be removed by methods other than impeachment

The "federal judicial system 1 District courts

The federal judicial system proper starts at the base with district, or trial, courts, of which 84 are distributed over the country s continental expanse to bring them within reasonably easy reach of litigants [8a] A small state, such as Vermont or New Hampshire commonly constitutes a district by itself, larger and more populous ones usually are divided into two or more districts, which may further be broken down into divisions In each district will be found at least one judge But there may be more (up to a present maximum of 16) if the volume of business requires, and the total today (1951) for the 48 states is 197 [8b] Whatever the number in a district each ordinarily holds court separately, although in some types of cases *e g* the issuance of injunctions in certain instances, three must sit together

Their jurisdiction

Cases triable in a district court are of many different kinds All federal crimes are prosecuted there and all proceedings instituted under the anti trust laws Included also are admiralty cases, suits arising under the internal revenue, postal, copyright, patent bankruptcy, and immigration laws, or under any law regulating interstate or foreign commerce, as well as cases removed from a state court before trial and the very prolific category of cases between citizens of different states and between citizens of a state and a foreign state or its citizens, where the value in controversy exceeds $3,000 In some instances, appeals may be taken directly to the Supreme Court, but as a rule they go first to the appropriate intermediate court of appeals The district courts themselves have no appellate jurisdiction, except in a qualified sense on rulings of their own ' commissioners, or assistants The common impres sion that cases may be appealed from a highest state court to a federal district court is quite erroneous [9]

2 Courts of appeals

Next in order come the courts of appeals,[10] of which one is found in each of 10 large judicial circuits into which the country is divided, with a similar tribunal operating also in the District of Columbia Designed to relieve the Supreme Court of business which it would not have time to handle, these intermediate tribunals, with 65 judges in all (and with every case heard by at least two, and usually three), have for their sole function the hearing of appeals on questions of law from district courts within the respective circuits, together with reviewing and enforcing orders of many quasi judicial bodies like the Securities and Exchange Commission and the National Labor Relations Board Decisions usually are final But any case in which an appeals court declares a state law unconstitutional may, as a matter of right be carried on appeal to the Supreme Court Most cases may be carried from an appeals court to the Supreme Court only if the Supreme Court chooses to accept

jurisdiction Even before a case has reached decision in an appeals court it may be transferred to the higher tribunal, but this is very rare Cases in which a law of Congress is held unconstitutional may go straight from a district court to that tribunal, by passing the appeals courts altogether The number of cases considered in such courts every year is, however, close to 3,000

3 The Supreme Court

a Chief justice and associates

At the top of the system—in a sense, at the head of the entire judicial organization of the United States—stands the Supreme Court, first organized under the Judiciary Act of 1789 with a chief justice and five associate justices, but now consisting of a chief justice and eight associates Although receiving slightly higher compensation,[11] the chief justice has in reality no more legal weight or influence in deciding cases than any of the associate judges He is simply the presiding judge at sessions of the Court, acting further as a sort of chairman in assigning to his associates the task of writing the Court s decisions in cases that have been heard and discussed, although with no exemption from shouldering a share of this work himself[12] In all, 13 different chief justices have presided over our highest judicial tribunal The outstanding figure in the list is John Marshall, whose tenure covered 33 years (1801-34), and who, because of his forceful and winsome personality, his firm and clear convictions in favor of a liberal construction of the powers of the national government and the masterful logic and lucidity of style with which those convictions were expressed in many a notable decision during the formative period of our national institutions, is justly regarded as "the second father of the constitution —even though some of the constitutional interpretations for which he is famous are not in favor with the Court as it stands today There have been associate justices also whose personality and influence upon our constitutional history entitle them to high regard, notably Joseph Story (1811-45) and Oliver Wendell Holmes (1902 32)

b Sessions and quorum

Regular and public ' terms " or sessions, of the Supreme Court are held annually in a spacious white marble Supreme Court building facing the east front of the Capitol beginning on the first Monday in October, usually ending by the middle of the following June, and with two week periods for hearings alternating with like periods for study of records and briefs Saturday conferences on pending cases and writing of opinions Six justices must be present at the argument of a case and any decision arrived at, to be official and binding, must be concurred in by a majority of that quorum—in other words, by a minimum of four justices If in a given case, the requisite majority cannot be obtained for a decision, or if the justices are evenly divided, a rehearing may be ordered, although an even division on a question of reversing a lower court has the effect of upholding the earlier finding

c Decisions and opinions"

Supporting every decision is a more or less extensive "opinion,' prepared (after the case has been heard and discussed) by whatever member of the Court may have been given the assignment, and setting forth with pertinent citations, the line of reasoning pursued, and any justices who concur in the

[11] $25,500 as compared with $25 000 Like all other judicial salaries these are taxable

[12] If however the chief justice stands with the minority on a case the senior associate justice on the majority side assigns the writing of the majority opinion

result, but have arrived at it by a different route, are entitled to contribute single or joint "concurring" opinions, while any one or more unable to concur may submit single or joint "dissenting" opinions. Concurring and dissenting opinions have no effect on the decision in the given case, but by cumulative development of lines of judicial thinking may influence the handling of cases later on. All opinions are published by the government, for the benefit of the legal profession and general public, in a series of volumes prepared under the editorial supervision of a reporter appointed by the Court and entitled *United States Reports*.[13]

d. Jurisdiction

Cases reach the Supreme Court in two or three different ways. A few, *i.e.*, those affecting ambassadors, other public ministers and consuls, and those between two or more states, usually are commenced there, and over these the Court is said to have "original" jurisdiction.[13a] The great majority, however, come by appeal from a decision of some lower federal court (usually a court of appeals, but occasionally a district court) or of a highest state court when a federal question is involved. Under certain circumstances, the Court has no option but to receive and adjudicate an appealed case, *e.g.*, where a highest state court has held invalid some federal law or treaty, or has held valid some state law alleged to be contrary to the federal constitution or a federal law or treaty. Otherwise, however—subject to conditions laid down by Congress—there is a good deal of discretion, and with the Court in these later days focusing its attention increasingly, not upon mere settlement of law suits in the manner of an ordinary law court, but rather upon constitutional interpretation and policy, especially in economic and social fields, appeals lacking in this higher interest are likely to encounter no very warm reception. Even so, the number of cases getting on the Court's docket in a single year, and disposed of in one way or another, rarely falls below 1,250. Some, considered outside of the Court's jurisdiction or of little merit, are simply "dismissed", others, turning on points of law on which the justices already are agreed, are taken care of, without a hearing, by a *per curiam* decision, still others, calling for full consideration, are argued orally and settled in written opinions.

## THE SUPREME COURT AS GUARDIAN OF THE CONSTITUTIONAL SYSTEM—JUDICIAL REVIEW

In deciding cases, all courts have to consider whether rights, powers, and interests in controversy are claimed under laws consistent with relevant constitutional provisions, and it becomes the most important and distinctive function of the federal Supreme Court to pass final judgment upon the consti-

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may be

commenced elsewhere

tutionality both of state laws and of acts of Congress, and of executive actions as well In performing this function, it serves as the ultimate defender, on the one hand, of the reserved powers of the states and, on the other, of the supremacy of national law—the supreme guardian, indeed, of the federal constitutional system itself How and why judicial review arose, and the immense significance of it in the building of a strong national government, have been touched upon at an earlier point in this book [14] The fact was observed that the constitution nowhere expressly confers such power, and that there always have been people who looked upon the exercise of it by the courts as sheer usurpation But it was observed, also, that no less authorities than Alexander Hamilton and John Marshall believed that, in hearing and deciding cases, the courts must necessarily have an eye to the constitutional validity of any state or federal laws involved, and the opinion was ventured, not only that under a divided system of government such as ours, court review of legislation is practically inevitable, but that it is entirely consistent with the spirit of the constitution and in fact, as we are situated, indispensable

Review of state statutes and actions

The truth is that the great majority of cases reaching the Supreme Court turn upon, or at least involve, the constitutional validity of some state statute or executive action or of some federal statute, treaty, or executive act State statutes or executive actions incur review normally when a highest state court has held that a given statute or action is consistent with the constitution and laws of the United States, but the defeated litigant believes otherwise and causes the issue to be carried to Washington Even a provision of a state constitution may be challenged And what happens is that the federal Supreme Court, if it takes jurisdiction of the case, scrutinizes the constitutional issue at stake and either sustains the state court's finding or reverses it, in which latter event the offending statute (or specified section thereof), or executive action, becomes of no further effect In earlier days, this was the form which federal judicial review most commonly took, and to the consternation of states' rights people—and later of people interested in advanced labor and other social legislation in the states—long lists of acts of state legislatures were given the *coup de grâce*

Review of federal laws and actions

But judicial review operates also within the confines of the federal government itself when some dissatisfied person, corporation, or group considers itself injured by a measure of Congress, an executive act, or even a treaty provision, and goes into a federal court to prove that a right or immunity supposed to be protected by the constitution has been denied The question is likely to come down to that of whether Congress or the executive had proper power, under the constitution, to pass the law or perform the act prompting the protest, and here again, if, after hearing a case brought up from a lower federal court, the Supreme Court concludes that the plaintiff's contention is sound, it decides accordingly, reversing any previous decision to the contrary and making the disputed legislation or executive action as if it had never existed Needless to say, a Supreme Court ruling on the constitu-

[14] See p 44 above

tionality of either a state or a federal statute or executive act settles the matter, at least for as long as the Court does not change its mind—which sometimes happens

Resulting criticism

Of course the Supreme Court has been responsible for invalidating only a very small percentage of the thousands of measures passed by Congress and the state legislatures since 1789—only some 77 congressional acts or parts of acts (none between 1803 and 1857) and perhaps 200 pieces of state legislation In a good many instances, however, the laws stricken down have been of deep public concern, *e g*, the Missouri Compromise Act of 1820 nearly a century ago, and more recently the federal income tax law of 1894, the child labor laws of 1916 and 1919 and a stream of New Deal statutes of 1933-35, incurring 11 rapid fire Court reversals in the two years 1935-36 Frequently, too, the measures involved have arisen out of, or have been surrounded with, bitter political controversy And while it no longer is worth any one s breath to argue against the Court's right to exercise the function of review, and while, too, a great deal of deference has been shown the Court (particularly in its heyday of power and prestige between 1865 and 1930), it always has remained open to people who did not like what was happening to criticize the manner in which the Court exercised its prerogative, to attack the point of view and philosophy animating various groups of justices, and even to cast aspersions upon the motives and discernment of presidents in selecting the justices in the first place

Influence of the predilections of justices

For it must be remembered that what the Court says and does at any given time depends very largely upon who the justices are, upon their temperaments, and upon their characteristic attitudes and views They, it is true, are supposed to be above personal animus, partisan or otherwise, and to the end that they may enjoy all possible independence and security, they are guaranteed tenure during good behavior, paid liberal salaries which may not be reduced during their period of service, and shown deference befitting members of what Americans have been pleased to regard as "the most august tribunal on earth" But they remain human beings, and bring to their posts strong political, social, and economic predilections, to which they, indeed, sometimes owe their appointment And in interpreting and applying words and phrases—"regulate," "commerce," "due process of law"—which in some instances have come down from the eighteenth century, they hardly can fail to be swayed, consciously or unconsciously, by their social philosophies and general outlook on affairs

The Court as a maker of policy

It must be remembered, too, that when interpreting and applying the language and spirit of the constitution, the justices are acting not merely as a judicial body settling lawsuits, often as not, they also are deciding questions of public policy Thus when, after Congress has passed an act and the president has approved it, the Court intervenes in a case brought under it and overthrows it, the justices in effect are ruling that the policy embodied in the measure shall not, after all, be the policy of the country—at least not until a perhaps differently constituted Court at some later time takes a different attitude, and the ground for such intervention is that, in the Court's opinion,

the constitution does not mean what Congress and the president thought it meant We are under a constitution," remarked former Chief Justice Hughes many years ago but the constitution [and therefore what can lawfully be done under it] is what the judges say it is " [15] Mr Justice Frankfurter has put the matter even more tersely by saying 'The Supreme Court is the constitution

**The Court controversy of 1937**

During the first half of President Franklin D Roosevelt s second administration a Court dominated by elderly justices of pronounced *laissez faire* inclinations brought on one of the most heated political controversies in our history by striking down a lengthy list of New Deal measures regarded by many people including the President as necessary for bringing a hard pressed country back to prosperity To overcome the difficulty without going to such an extreme as totally withdrawing the power of judicial review, the President proposed that a Court living in horse and buggy days" be rejuvenated and liberalized by adding a new and younger justice for every justice reaching 70 but failing to retire,[16] so long as the total number should not be raised above 15 The project presented no constitutional difficulties, the power of Congress to regulate the number of judges in all federal courts, and of the president and Senate to appoint any quotas authorized, was incontestable The wisdom and expediency of the plan however, as well as the motives behind it became subjects of stormy discussion in press on platform on the radio, in lawyers' gatherings and state legislatures and especially in Congress, and, after exciting days, a bill to carry out the President s design went down in defeat No extra judges were authorized

**Court reorientation**

With the controversy still raging the Supreme Court nevertheless began undergoing significant changes, even if not by the method urged—a reorientation which enabled the President and the country to get much of what they wanted, yet without legislative action at all [17] In the first place, the Court even as it stood showed a change of heart, not only by handing a series of decisions sustaining certain New Deal measures such as the Railway Labor Act (1934), the National Labor Relations [Wagner] Act (1935), and notably the Social Security Act (1935),[18] but also by completely reversing the position it had taken in an earlier District of Columbia case (Adkins v Children s Hospital) denying the constitutionality of minimum wage legislation [19] Moreover, within the space of barely more than a year, three 'conservative justices retired or died, opening a way for appointment of 'liberals' in their places In 1941, the most stalwart anti New Dealer of all (Justice McReynolds) retired, by 1943, all but two of the nine justices were Roosevelt appointees, and between 1936 and 1951, not only were but two minor provisions of just two acts of Congress declared unconstitutional, but no fewer than two dozen earlier restrictive decisions were overruled or softened

[15] *Addresses* (New York, 1908) 139 Mr Hughes was governor of New York and not a

with the Court practically going out of the business of pitting its judgment against that of Congress and the state legislatures in the field of social and economic legislation In this situation, even the President's interest in Court reorganization through legislative action waned, and almost before the country was aware, the controversy passed into history

A 'New Deal Court

For substantially a decade after 1937-38, the nation had a Supreme Court with a definitely New Deal background and orientation Of late, there has been some change for President Truman has less consistently selected new justices with New Deal antecedents Even yet, however, New Deal political philosophy is well represented, if not dominant To some people, this is a source of gratification, to others quite the reverse The period has not been one of great jurists on the Court few of the justices ever attracted attention for their legal learning, few even brought to their task significant judicial experience [20] The decade has been notable, too for divided opinions and sometimes sharply-worded dissents [21] And in 1946 bickering among the justices —although no novelty, as historians are aware—attained the proportions of a national scandal Nevertheless the Court in this period (perhaps for the very reason that it was so devoid of profound jurists) significantly modernized its methods of constitutional interpretation, and by the same token the constitution itself, and this modernization consisted essentially in replacing a traditional legalistic and almost mechanistic method of deducing decisions from the facts in a case, with little or no consideration of social and economic factors, by an approach based on the idea that the constitutionality of a law may properly depend, not solely upon the words and phrases of the constitution as meticulously weighed and dissected by the justices, but at least equally upon perception and understanding of the social or economic conditions that led the legislature to pass the law in the first place An occasional earlier justice of the Court had this less legalistic, more practical, approach, Oliver Wendell Holmes and Louis D Brandeis, famed as dissenters, did so But its adoption by substantially the full Court has come only in the last decade, and the resulting freshness and flexibility in attitudes and actions will make the period a notable one in Court history after most of the relatively obscure justices have personally been forgotten After all, a main responsibility of the Court is to keep the law abreast of the times

## LAW ENFORCEMENT—THE DEPARTMENT OF JUSTICE

Enforcing agencies

As chief executive, the president is charged with "taking care" that 'the laws be faithfully executed", and all federal law enforcement is to be regarded as proceeding ultimately from him For so immense a task, he has no

[20] Chief Justice Stone (who died in 1946) and Mr Justice Frankfurter had legal learning

unified federal police force operating throughout the country under his direct control All branches of the administrative system which he heads, however, enforce and carry out law in their particular spheres as part of their regular routine (in fact it is chiefly for this that they exist), and many have special investigating and enforcing machinery for employment when resistance or violation is encountered Thus, through a large staff of inspectors, the Post Office tries to bring to justice offenders against the postal laws and regulations The Treasury Department has a Secret Service for protecting the person of the president and uncovering counterfeiting of the currency and securities of the United States, also a Bureau of Narcotics charged with investigating detecting, and preventing infractions of the federal narcotic and related laws In its Bureau of Internal Revenue, the same Department has also an "intelligence unit" for running down violations of tax laws, and in its Bureau of Customs a service for detecting and preventing smuggling The Department of the Interior has investigating machinery, the Federal Trade Commission an investigating division, the Interstate Commerce Commission has a bureau of inquiry, and the list could be extended farther

**The Department of Justice**

There is, however, one administrative branch which, under the president's direction, has the enforcement of law as its very special function, namely, the Department of Justice Other agencies operate in particular fields, the Justice Department has general responsibility for the job as a whole And although one of the smaller executive establishments, the Department is among the most vigorous and important

**1 Central organization**

To be sure, the top official, the attorney general devotes his time largely to studying and rendering opinions on legal questions put to him by the president or department heads But he also supervises and bears responsibility for the work of the Department as a whole, starts prosecutions at the president's direction or on his own initiative, and in general, serves as the chief law officer of the federal government In the Department offices at Washington will be found also a deputy attorney general, an executive assistant to the attorney general, a solicitor-general, who most commonly represents the government before federal courts, a battery of eight assistant attorneys general in charge of antitrust, tax, criminal, and other divisions, a commissioner of immigration and naturalization, a pardon attorney, and, among other things, a Bureau of Investigation—the famous F B I, dating from 1934—charged with ferreting out violations of federal laws, chiefly in fields not covered by agencies like those mentioned above, fully equipped with finger print files and laboratory facilities (always at the service of state and local law-enforcement officers), and focused particularly upon the crime-detection work of the hundreds of vigilant and efficient "G-Men"

**2 Field force**

For the prosecution (and to some extent the detection also) of offenses against the federal laws, the Department relies heavily upon a nation-wide field force consisting principally of a district attorney and a marshal in each of the 90 judicial districts into which the country (including the territories) is divided Aided by one or more assistants, a district attorney presents to a federal grand jury all violations of national laws reported to him or otherwise

coming to his attention within his area, and if that body brings an indictment, it falls to him to conduct the government's case against the accused person On a higher level, his work, therefore, bears general resemblance to that of a county prosecuting attorney Assisted by deputies, the district marshal arrests and holds in custody persons accused of federal crime, summons jurymen, serves legal processes, executes the judgments of federal courts, and if need be protects federal judges from personal violence when engaged in the performance of their official duties—thus serving his district very much as a sheriff serves his county In each district, too, the judge appoints one or more United States commissioners empowered to administer oaths issue warrants of arrest, subpœna witnesses, conduct preliminary hearings of accused persons, discharge such persons or admit them to bail and in other ways to assist in expediting the enforcement of the federal criminal laws Needless to say, the effectiveness of the courts and the respect entertained by the people for them and for the law depends heavily upon the vigor, intelligence, and fidelity with which law-enforcement authorities of all grades apprehend offenders and carry out the findings of the courts against them—findings which the courts themselves can declare but have no means of executing

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PART IV

# The National Government: Functions and Services

# CHAPTER 24

## Federal Finances

Eleven preceding chapters have been devoted to the executive, legislative, and judicial branches of our national government and how they operate It is now time to see what they do, and ten chapters set aside for this purpose will take us into broad fields like finance, commerce, business, agriculture, conservation, labor, social security, defense, foreign relations, and territorial administration Basic to everything else is finance Even for sustaining the federal machinery above described, substantial funds are required If, however, this were all, the federal budget would be modest indeed compared with what it is What runs national outlays into the multiplied billions now burdening the taxpayer is, of course, the *tasks performed* and *services rendered* And in turning to this functional aspect of our national government—furnishing the sole reason for maintaining the huge establishment at all—we logically start with the financial operation by which it is supported, including how the appropriate authorities decide what to spend and on what, and how they get the money *Expenditure determines taxation and debt, and accordingly has* first claim to attention

### PLANNING AND CONTROLLING EXPENDITURES— THE BUDGET SYSTEM

The spending power

The constitution has rather more to say about raising revenue than about spending it authority to tax, as well as to borrow, is expressly conferred, and various limitations upon the taxing power are carefully prescribed A government, however, that could not spend money would be no government at all, and ample federal spending power is supplied, not only in the authorization of Congress to 'pay the debts and provide for the common defense and general welfare of the United States," [1] but in various other provisions conferring authority to do things which cannot possibly be done without spending money, *e g*, raise and support armies, provide and maintain a navy, establish post-offices and post roads, and maintain a system of courts By inference, expenditures may be incurred only for debt payment, defense, and welfare, but only three restrictions are imposed expressly (1) that appropriations for the support of the Army shall not be "for a longer term than two years", (2)

[1] Art I § 8 cl 1

that "no money shall be drawn from the Treasury but in consequence of appropriations made by law", and (3) that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time"[2] Under judicial construction, the objects of expenditure specified cover practically any outlays that Congress conceivably might undertake, and no limits whatever are placed upon amounts

Loose methods of appropriation before 1921

Not a dollar of federal money however, can be expended legally except by authority of Congress, and passing the great appropriation bills becomes not only one of the major tasks of that body at every regular session, but the prime means by which it checks and controls the executive branch and its policies For many years before the adoption of a budget system in 1921, such bills were drafted and introduced by no fewer than nine different House committees (the bills themselves commonly numbering 14), and in the Senate were handled by as many as 15 Based upon more or less inflated requests made by the various spending agencies, and merely swept together and transmitted to Congress in an undigested mass by the secretary of the treasury, these bills were not only framed, but considered and reported by the several committees, in little or no relation to one another—and, what was worse in little or no relation to the condition of the Treasury or to the outlook for revenue With no single guiding hand to exercise restraint, they were likely to emerge in even more inflated form than when they first made their appearance, and although the president could warn and admonish, he as a rule could in the end do nothing except affix his signature, since to do otherwise might bring necessary government activities to a halt Under such division of responsibility, log rolling became a fine art, the 'pork barrel' an inexhaustible resource

The Budget and Accounting Act of 1921

In days when expenditures were relatively modest and revenues usually adequate to meet them criticism of such haphazard procedures had little or no effect The startling upswing of national outlays during World War I, however, lent new force to a growing demand for reform, and in 1921 a national budget system, such as long had been advocated, notably by President Taft, became a reality The essence of a sound budget system consists in careful planning of the expenditures of a given fiscal period (normally a year) in relation to anticipated income, by a single authority (preferably the executive), which not only will correlate estimated income and outgo, but see that all reasonable economies are practiced, and while the plan introduced by a Budget and Accounting Act of 1921[3] left, and still leaves, a good deal to be desired it in general meets this primary specification

The Bureau of the Budget

The planning and coordinating agency set up by the act is the Bureau of the Budget, originally attached loosely to the Treasury Department, although in effect an independent establishment As supreme director of national administration, the president, however, is the logical authority to bear primary responsibility for preparing integrated programs of spending and revenue raising, and after Franklin D Roosevelt became chief executive, the Bureau

[2] Art I § 8 cl 12 and § 9 cl 7
[3] 42 *U S Stat at Large* 20

was drawn into closer relations with the White House, until eventually, in 1939, it was absorbed outright into the Executive Office of the President, thereupon becoming the chief executive's largest and most important staff agency—his arm for all contacts and dealings with the financial side of the government [4]

Its expanded rôle

Moreover, with the passage of time there has been a remarkable expansion of functions From an agency concerned with little more than coordinating requests for funds in relation to anticipated revenues and putting them into coherent shape for transmission to Congress, the Bureau has developed into the principal aid to the president in planning and guiding the operations of the entire executive branch of the government Conceptions of the budgetary process itself have been broadened to include not only the formulation of well-defined financial programs for the various departments and establishments, but also supervision of and control over the execution of such programs, including continuous study of problems of administrative organization and business methods Resulting in part from the enlargement of governmental activities in fighting the depression of the thirties, the Bureau's new rôle arose to an even larger extent from situations created by the later defense effort and war, when greater responsibilities than ever before were thrust upon the president, and when, in passing them along, as he must, to departments and other agencies, he found the Bureau the handiest and most serviceable medium for maintaining the supervision and responsibility incumbent upon him

Preparing a budget

Although the government's tax year *e g* the year for which taxable income is computed and in which most taxes are paid, corresponds to the calendar year, and therefore starts on January 1, its 'fiscal' year, *i e*, the year for which expenditures are planned and accounts made up, opens on July 1, [5] and a given fiscal year is barely entered before work on the financial arrangements for the ensuing year is started First of all every operating agency is asked by the Budget Bureau to compile detailed estimates of the funds that it will need in the next fiscal year and to submit such estimates not later than September 15 In larger agencies, this is done by special budget officers, in lesser ones by members of the staff detailed for the purpose, and for many weeks conferences go on between these or other agency representatives, on the one hand, and a division of estimates in the Budget Bureau on the other—the former commonly pressing for as generous allotments as they can hope to get, the latter raising questions, offering objections, and seeking to whittle down requests sometimes regarded as extravagant or at any rate impracticable On larger matters, the budget director is brought into the discussions, and, subject only to reversal by the president, his word is law for every department, bureau, board, and commission as to what expenditures (and in what amounts) shall be recommended to Congress and what ones shall not Mean-

[4] The director is appointed by the president alone for an indefinite term and Bureau personnel numbers some 525

[5] A fiscal year therefore, runs from July 1 to the following June 30 and is designated by the year which includes the last six months Thus fiscal 1952 is the period from July 1, 1951, to June 30 1952

while, the Treasury Department, on its part, has been asked not only for data concerning interest charges on the national debt, but also for detailed estimates of the revenues that may be expected during the given period, together with proposals for increasing such revenues in case they promise (as nowadays they almost always do) to be insufficient

With all estimates and other information finally in hand (ordinarily by December 1) Bureau officials total up the amounts, arrange data in logical order, and work the whole into a volume of sometimes 1,500 or more closely printed pages—i e the budget —which, by the close of the calendar year, is placed on the desk of the president At this last moment that official may revise or strike out items But usually he has already assented to most of them, and, with Congress coming into regular session normally on January 3, he, commonly within a few days after transmitting his "state of the union" message, submits a special message presenting the budget as a balanced fiscal plan for which he assumes full responsibility, and covering not only appropriations but revenues and if necessary, proposals for deficit financing[6]

A budget before Congress

In 1920 with the adoption of a budget system imminent, the House of Representatives prepared for the new order of things by enlarging its appropriations committee to 35 (now 50) members, giving it jurisdiction over all appropriation proposals, and authorizing it to employ as many as 15 subcommittees (the number in 1950 was nine) for handling proposals relating to particular departments or agencies Received in the House, a budget's revenue proposals are at once turned over to the committee on ways and means, and its far bulkier proposals for expenditure to the appropriations committee, and formerly the two committees and their subcommittees worked independently from this point, with the corresponding Senate committees simply marking time until bills came over from the other branch With a view to more coordination, the Legislative Reorganization Act of 1946 interposed a new procedural stage by requiring that, upon receipt of the president's proposals for a given fiscal year, the House committees on ways and means and appropriations and the corresponding Senate committees on finance and appropriations, or duly authorized subcommittees thereof, should form themselves into a joint committee and, with the president's recommendations before them, work out a legislative budget fixing a ceiling for the total amount to be appropriated and providing for any necessary borrowing, and report the results to the two houses by February 15 (or later date agreed upon) as recommendations for adoption As tested in sessions of 1947-49, however, this plan almost totally failed to yield the expected economies, "ceilings" tentatively established were afterwards largely ignored, and since 1950 the law's requirement has been a dead letter

Whether adhering to the president's recommendations or following alternative ones offered in the legislative budget, or indeed striking out on more

[6] If unanticipated necessity arises supplementary and deficiency estimates may be presented to Congress after submission or even after adoption of the regular budget and "deficiency" appropriation bills are passed at every session It hardly needs to be added that in war years or even when large scale defense preparations must be undertaken somewhat suddenly (as in 1940 and again in 1950) special—and huge—appropriations become necessary without much reference to the regular calendar

or less independent lines, appropriation subcommittees in the House, frame 10 or 12 separate appropriation bills providing for departments and establishments, singly or in groups, and, after being approved by the main committee and passed by the House, these several measures are transmitted to the Senate and there put through the same routine, with conference committees, as a session nears its end, getting them into agreed form, for final passage by the houses and submission to the president In 1950, a "single package" plan was introduced under which, before appropriations were finally voted, most major ones were brought together in one bill, after the manner of the single great annual appropriation bill in the British Parliament, and also of consolidated appropriation bills encountered in some of the American states By decision of the House appropriations committee, however, the device—although supported by a good many members of both branches (especially the Senate) as in the interest of unity and economy—was abandoned after one trial

*Framing and adopting appropriation bills*

During the 30 years since the budget system went into operation, it has abundantly proved its worth Under the relatively normal conditions prevailing in the earlier part of the period, it enabled the president to hold the spending agencies reasonably in leash and to effect substantial economies, and even in the years of extraordinarily lavish expenditure associated with the New Deal, with the defense and war efforts of 1940-45, and with subsequent costly foreign aid and revived defense preparations—when as a rule the executive rather than Congress was taking the lead in planning huge outlays—it imparted unity and responsibility which otherwise would have been lacking Not only does the system open a way for thorough and impartial review of the estimates of all spending agencies, and for reduction of those found questionable, before they are sent to Capitol Hill, but it enables Congress to act with fuller information concerning not only pending proposals, but the state of the country's finances generally, recent and current trends, and the outlook for at least a brief period to come, and when the President's Committee on Administrative Management appraised the system in its report of 1937, it gave full credit for these and other gains

*Some benefits realized*

There is, however, room for improvement [68] It would be advantageous, for example, if department heads and the director of the budget were given the privilege of the floor in Congress, so that they might explain budgetary proposals (or omissions) to the general membership of each house, as they now explain them to individual leaders, committees, and subcommittees Appropriation bills of wide scope no longer are introduced except by the regular appropriations committee But representatives and senators freely exercise their privilege of presenting bills calling for expenditure of money for particular projects—building a post office, constructing a dam, dredging a harbor, or "improving" a river—in which they (at all events the voters back home)

*Possible further improvements*

are interested Although not successfully operated, the "legislative budget' provided for by the Legislative Reorganization Act of 1946 was based on a good idea And it would save taxpayers millions of dollars a year if Congress would emulate the example of the British Parliament, and, as a matter of regular practice, refrain from voting funds for any purposes, or in any amounts, not specified in the carefully considered plans of the executive At the very least, if present usage is to continue, it would be helpful if, by constitutional amendment the president were given power to veto separate items of appropriation bills

Executing the budget—the General Accounting Office

In its report of 1937 the President's Committee on Administrative Management criticized the Budget Bureau for concentrating too much upon the preparation of budgets and not giving enough attention to "supervision over the execution of the budget by the spending agencies " As the Committee was frank to recognize, the Bureau never up to that time had been given sufficient staff or money to enable it to perform this added task The situation has now been measurably corrected, and much is done by way of checking up on the use actually made of funds voted and supervising the transfer of funds from one agency to another There is need for such work, notwithstanding the existence of another establishment—the General Accounting Office—created by the same act of 1921 which brought the Budget Bureau into existence, and now significantly regarded as a part of the legislative branch In addition to auditing the accounts of spending agencies and prescribing their form, this large independent agency—particularly independent because its head, the comptroller-general is appointed by the president and Senate for a 15 year term, is ineligible for reappointment, and is removable only by impeachment or by joint resolution of Congress—has as a main function the validation of payments for services, supplies etc , as a means of seeing that all such outlays fall within the purposes and limits of appropriations as made by Congress Without the comptroller general s approval, money for such purposes cannot be drawn from the Treasury, or, if drawn and paid over, must be refunded

## THE GROWTH AND PRESENT PATTERN OF NATIONAL EXPENDITURES

In the first decade of the present century, the national government rarely spent as much as half a billion dollars a year, indeed, the Fifty first Congress (1889-91) not long previously had achieved notoriety as the first to appropriate over a billion during its biennium From that modest level, national expenditures have vaulted to proportions staggering the imagination By the beginning of Franklin D Roosevelt's presidency in 1933, outlays had reached $4 billion a year, and from that point the pattern was stretched almost beyond recognition—first, by new forms of expenditure aimed at lifting the country out of depression and improving the social and economic order, and afterwards, in far greater measure, by outlays on defense preparations and war Three years of fighting depression pushed the figure for fiscal 1936 to over $9

billion The next year, some economic improvement permitted a drop to about $8 billion But recession in 1937-38, combined with growing outlays for defense (especially naval), carried the figure steadily upward to above $12 5 billion in fiscal 1941, exclusive of debt retirement

Some astonishing figures

Even this was only the beginning of a leap to heights which a few years previously would have seemed fantastic Within the first six months of the following fiscal period, the fast expanding defense effort merged into war effort on the most gigantic scale ever known to the country, and the total outlay for that year (fiscal 1942) exceeded the astonishing figure of $32 billion—more than World War I cost us altogether This too, however, was merely a prelude to more stupendous outlays later, in fiscal 1943, they rose to $78 billion (almost double the total national income in the depression year 1932), and in fiscal 1945 they reached a wartime peak of more than $97 billion—or almost half of the "gross national product" (total production of goods and services) for that year

With hostilities ended, outlays for fiscal 1946 dropped to slightly less than $65 billion, for fiscal 1947 to approximately $42 5 billion, and for fiscal 1948 to $33 8 billion In 1947, competent economists estimated the yearly cost of operating the government in future more or less normal times at somewhat over $22 billion Times, however, persisted in being decidedly "less" rather than "more" normal Heavy civilian and military expenditure on the occupation of former enemy countries continued, foreign aid and rehabilitation (notably the Marshall Plan) required huge subventions, other aspects of a "cold war" with the U S S R were costly, outlays for veterans' benefits catapulted to new heights, inflated prices compelled the government to raise salaries and to pay more for everything it bought, and to all else was added the cost of servicing a tremendous national debt As a result, the national outlay, far from declining toward the economists' optimistic estimate, seemed rather to be levelling off somewhere between the 1947 and 1948 figures

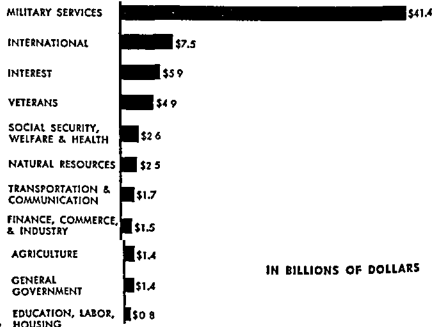
"Seemed" only, however—because even in fiscal 1949 European aid and military costs brought expenditures back to over $40 billion, in 1950 an unprecedented peacetime budget of $42 4 billion culminated in actual expenditures of $47 2 billion, and with the Korean war in full swing and a new general rearmament program undertaken (for the third time in 35 years), a budget of $71 6 billion (an increase of almost 79 per cent over the previous year's estimate) was submitted for fiscal 1952, and when Congress adjourned in October, 1951, it had appropriated or authorized $91 2 billion, of which at least $72 billion could be spent in the fiscal year Once more—but starting from a far higher point—we were whirling up the widening spiral of the forties

Where the money goes

Statistics often are uninteresting The only means, however, of indicating at a stroke what our present stupendous national expenditures mean in terms of functions or purposes is a break down of the figures for three years, followed by a graphic analysis of estimated expenditures in fiscal 1952 as they looked when the President submitted his budget early in 1951

NATIONAL EXPENDITURES BY FUNCTION [6b]
(in millions)

| Purpose | 1950 Actual | 1951 Estimate | 1952 Estimate |
|---|---|---|---|
| Military services | 12,303 | 20 994 | 41,421 |
| Veterans' services and benefits | 6,627 | 5,746 | 4,911 |
| International security and foreign relations | 4 803 | 4,726 | 7,461 |
| Social security, welfare and health | 2,213 | 2,520 | 2 625 |
| Housing and community development | 261 | 409 | 102 |
| Education and general research | 114 | 143 | 483 |
| Agriculture and agricultural resources | 2,784 | 986 | 1,429 |
| Natural resources | 1,554 | 2,117 | 2 519 |
| Transportation and communication | 1,752 | 1,970 | 1,685 |
| Finance, commerce, and industry | 227 | 368 | 1,524 |
| Labor | 263 | 212 | 215 |
| General government | 1 108 | 1,252 | 1,351 |
| Interest | 5,817 | 5,722 | 5,897 |
| Reserve for contingencies | | 45 | 175 |
| Adjustment to daily treasury statement basis | 330 | | |
| Total budget expenditures | 40,156 | 47,210 | 71,594 |



Some observations

The data presented largely tell their own story, but nevertheless suggest a few comments (1) For years, between 70 and 80 cents out of every dollar of our huge annual outlays have gone for defense preparations, support of international programs in the interest of peace, veteran benefits and services, and interest on a national debt resulting largely from world conflict—in other words, have been spent for purposes related directly to war, the effects of war, or efforts to prevent future war In a supposedly enlightened age, this seems incredible But all too truly it is the price we believe we have to pay for security in a dangerous world (2) Entirely apart, however, from war and threats of war, we still should have seen expenditures rise, perhaps sharply We have become a nation of more than 150 million people, everything is on a proportionally larger scale, demands of the voting public for expensive services have multiplied, inflation has pushed costs to ever higher levels Forty years ago, a purely *civilian* annual budget of $7 5 billion would have seemed fantastic But that is what we now have Even at home, big government of today inevitably means big spending (3) Within reason, the United States can support large expenditures—at least under existing economic conditions Its resources are unmatched by those of any other country, it has a steadily expanding labor force of almost 66 million, buttressed by resources and technology, its capacity for production is tremendous, national income ($248 billion in 1948) has risen to a level such that even a budget like that submitted for 1952 would cut into it by hardly more than a fourth If met resolutely with high taxation, expenditures on a pre Korean level (say $35 $40 billion a year) would not seriously disturb our economy, unless already strained by debt, depression, or war

(4) National spending both at home and abroad is, of course, under con

[illegible]

ministration have drawn sharp criticism, as did those of the Roosevelt Administration before it and not entirely on partisan lines Significant curtailments, however, are difficult to achieve Undoubtedly the government's essential work could be carried on with a somewhat reduced personnel working more efficiently and (in the higher levels) enjoying fewer perquisites But the saving although desirable enough, would be only the proverbial "drop in the bucket', and even cutting back domestic services like reclamation, flood control, and rural electrification, while prudently undertaken since 1950, also would make but relatively little difference Proposals to curtail a service of any kind evoke protest from everybody engaged in or profiting from it and congressmen find the resulting pressures impossible to resist Multiplied millions of people directly or indirectly benefiting from distribution of federal funds (more than 16 million actually receive federal checks of some description) may favor economy in this direction or that but never in their own [6c] A decade of spending ourselves into prosperity, followed by another of spending ourselves into

[6c] The annual Report of the Secretary of the Treasury indicated that in fiscal 1950 $13 3 billion was paid directly to individuals and this excluded insurance and

security, has created a public atmosphere in which spending instincts and habits seem entirely natural and will in future be curbed (as in time they must be) only with difficulty

## NATIONAL REVENUES—THE TAXING POWER

The taxing clause of the constitution

Although the national government receives no small amount of revenue from non-tax sources such as operating the postal service and the mints, fees from patents and copyrights, fees and fines imposed in the courts, and sales and rentals of land and other property, the money with which to undertake such stupendous outlays as those mentioned can be obtained in only two main ways, *i e* taxation and borrowing—in a sense in only one way, since borrowing is merely deferred taxation A major difference between the government under the Articles of Confederation and that under our present constitution is that, whereas the former could raise money only (aside from borrowing) by making requisitions upon more or less reluctant and negligent states, the latter can reach down past the state governments to the individual citizen, levy on his property or business or income, and enforce payment if necessary, by seizing and selling his possessions, and there is no constitutional limit upon the amount of tax that may be imposed Very appropriately, the long list of powers given Congress in the eighth section of the first article of the constitution starts off with the power "to lay and collect taxes, duties, imposts, and excises"

Restrictions on the taxing power

1 Purpose

Comprehensive, however, as is the taxing power thus conferred, it can be exercised only in accordance with certain express or implied restrictions To begin with, Congress is not free to levy taxes for any conceivable purpose whatsoever, but only (as the constitution plainly says), "to pay the debts and provide for the common defense and general welfare of the United States" "Debts" is a sufficiently definite term, "defense" somewhat more flexible, yet reasonably clear "General welfare," however, is so broad that there always have been differences of opinion as to what activities and objectives may be read into it In practice however,—especially of late—it has not furnished much of a hurdle for tax- and spending planners to surmount Any taxation (or appropriation) for a purpose regarded by Congress—backed by the Supreme Court—as falling within the boundaries marked out by the constitution for the federal government, either expressly or impliedly, can be justified under it, and not only Congress, but the Court as at present constituted is rather easily satisfied on the point

2 Uniformity of indirect taxes

Down to World War I, the greatest part of the national revenue always came from indirect taxes, *i e*, taxes paid by importers, manufacturers, and distributors and commonly passed on to the consumer, and, as we shall see, a large share still is derived from this source In laying taxes of the kind, Congress, however, is bound by the constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States" [7] The requirement does not prevent tobacco excises, for example, from falling more

[7] Art I § 8 cl. 1

heavily upon sections where tobacco products are manufactured extensively than upon others where there is little industry of the kind, it means merely that, in general, all cigars or cigarettes of a given kind or condition must be taxed at the same rate in all parts of the country Formerly, the clause meant also that duties on imports from all sources must be uniform Under Supreme Court decisions since 1901 however, rates on commodities coming from the insular dependencies may differ from those on imports from other areas, and under the reciprocal-trade agreement system instituted in 1934, there now may be further variation, according to arrangements with different countries from which commodities come

3 Othe express restrictions

The taxing power is further limited (1) by a constitutional provision forbidding duties on exports, although Congress is authorized to regulate export trade in every way other than by taxation and (2) by the requirement that direct taxes shall be apportioned among the several states according to population As interpreted in earlier days—to include only poll or capitation taxes and taxes on real estate (and at one time slaves)—direct taxes have been laid by Congress only four times in our history, most recently in 1861 Taxes on incomes laid in 1862 were held by the Supreme Court to be excise, not direct, levies When, however, the validity of a new income tax law was challenged in the last decade of the century, the Court ruled differently, and ultimately, as we have seen, the obvious impossibility of taxing incomes in accordance with any mathematical apportionment among the states led in 1913 to adoption of the Sixteenth Amendment, brushing aside the entire question of whether income taxes are or are not direct taxes and simply authorizing Congress to 'lay and collect taxes on incomes, from whatever source derived," without apportionment

4 Implied restrictions

Finally may be mentioned restrictions nowhere specified but up to now regarded, with judicial support, as implicit in the nature of the federal union, i e, restraint from taxing (a) the property or essential functions of state governments or their subdivisions and (b) securities issued by such jurisdic- ... restriction ... Congress, ... on of state and local salaries already has been [8] As yet, however, it belongs in the list

Taxatior not primarily for revenue

Most laws imposing taxation can readily be classed as revenue measures, i e, measures in which the primary, if not sole, purpose is to produce income for the government There are, however, measures which, although tax laws in form, are intended mainly for regulative purposes and, if yielding revenue at all, do so only incidentally A good example is tariff schedules planned for the protection of American industries against foreign competition In so far as goods affected find their way to our ports notwithstanding heavy duties attached to them, some revenue results But high productiveness is not expected Indeed Congress has at times gone so far as to impose taxes with the avowed purpose of destroying a business enterprise altogether—taxing it out of existence and thereby rendering it wholly unproductive, as when, in 1865, a tax

[8] See p 54 above

measure imposed so onerous a levy on notes issued by state banks that (as was the intention) it became unprofitable to issue them and their issuance ceased In general, measures of the kind have been sustained whenever the courts considered that the taxing power was being used in pursuit of a purpose expressly or impliedly within the scope of congressional authority

Taxation and *general* welfare

Is a tax constitutional, however, when not clearly either a revenue measure or a device for rendering effective some delegated or implied power, but rather is aimed solely, or principally, at promoting the "general welfare? This question was raised pointedly by laws of 1886 and later laying a prohibitive excise tax on sales of oleomargarine colored to resemble butter, by an act of 1912 taxing the manufacture of poisonous white phosphorus matches, by laws of 1914 and 1919 imposing taxes on dealers in narcotic drugs, by the act of 1919 laying a 10 per cent tax on the net income of industrial establishments employing children under the age of 16, and by the Agricultural Adjustment Act of 1933 imposing levies on processors of grains, meat, cotton, and other commodities as a means of raising money for a program of curtailing agricultural production In cases coming before it at different times, the Supreme Court upheld the oleomargarine and narcotics laws as revenue measures, refusing to inquire into the legislative intent behind them,[9] and the constitutionality of the phosphorus match law never has been judicially tested When, however, the child labor law was challenged, the Court fixed attention on the motive animating Congress and in 1922 held the measure invalid for the reason that the tax imposed had as its sole purpose an objective, *i e*, the regulation of child labor, regarded by the justices then sitting as a function reserved to the states Similarly, the Agricultural Adjustment Act was overthrown in 1936 not only because, said the justices, the processing taxes for which it provided were not true taxes in the sense of levies for general support of the government, but also because these taxes, too, were being employed to extend the federal regulating arm into a field—the control of agricultural production—belonging to the states

Since these decisions were rendered, there have been changes A Court with different personnel and viewpoints has broadened its concept of federal power (especially under the commerce clause), and, as illustrated by the justices' approval of the social security taxes introduced in 1935, general welfare now can be promoted by levies which once would hardly have escaped judicial condemnation Pushing farther ideas advanced by Presidents Theodore Roosevelt, Wilson, and Hoover, President Franklin D Roosevelt repeatedly advocated making the distribution of wealth and economic power more equitable by taxing "swollen fortunes", and in much of our present income and inheritance taxation that purpose is almost as evident as the immediate one of raising revenue

[9] Over vigorous opposition from dairy interests the federal oleomargarine tax was repealed in 1950 with however numerous state taxes and other restrictions remaining.

## THE ENACTMENT OF TAX MEASURES

Origins and frequency of tax legislation

Appropriations generally are made for some specified and limited period, most commonly a year, and consequently a sheaf of appropriation bills must be passed every 12 months, with deficiency measures interspersed as needed Measures imposing or readjusting taxation, on the other hand, usually are without time limits, a given tax once levied, or a given rate once established, continues operative as long as not repealed or amended This, however, does not mean that many years go by without new revenue legislation Every annual budget transmitted to Congress by the president contains estimates of the revenue to be anticipated from existing sources, and along with these will almost invariably be submitted proposals for increasing the inflow by new or amended taxation if the yield does not promise to be sufficient, or for decreasing it if (as almost never happens any more) it promises to exceed needs, or perchance for maintaining the yield but redistributing tax burdens On its part, Congress, too, may—as in the case of two tax reduction bills killed by presidential veto in 1947 and one passed over a veto in 1948—initiate revenue measures wholly outside of the executive's budget plans and even incompatible with them Accordingly, tax legislation—if not in the form of a comprehensive over all revenue act, at least in that of a more or less significant amending measure—is to be anticipated with substantially the same yearly regularity as appropriations acts

The handling of revenue bills

All measures for raising national revenue are required to originate in the House of Representatives [10] All portions of the president's annual budget message relating to the matter are promptly referred to the ways and means committee of that body And to this group it falls to whip into shape a tax bill, sometimes following closely, sometimes less so, the plans and recommendations of the chief executive and his budget director, and back of them, the Treasury Department Working for weeks, through subcommittees when necessary, and with help from conferences with the chief executive, budget director, Treasury officials, bankers, business men, and others the committee finally emerges with a measure which for further weeks absorbs much of the time and energy of the House Passed by that body, the bill goes to the Senate, where, notwithstanding that the House originally was intended to enjoy substantial primacy in controlling the national purse, most revenue measures are more or less drastically altered, either in the finance committee or on the floor There is, indeed, nothing to prevent the Senate from amending a House revenue bill by striking out all parts after the enacting clause and inserting an entirely new bill, and something of the sort has happened on several occasions It is even possible for a bill which in effect, and almost in technical form, is a bill to raise revenue to be passed in the Senate before the House has taken any action at all In any event, a major tax bill, after passing both branches, will most certainly have to "go to conference", and it commonly is in the form in which it emerges from conference that the two houses finally

[10] Art I § 7, cl. 1

enact it and the president signs it [11] Throughout the entire procedure, the country—especially the business element—watches with interest, and even anxiety, to see what new taxes will be decided upon, and what increases or other changes will be made in existing ones

## THE PATTERN OF FEDERAL TAXATION

Earlier situation

On the basis of "incidence," i e, the point where the actual burden falls, taxes classify as direct and indirect—the former assessed upon and paid by persons who cannot shift the impact to other shoulders, the latter imposed and collected commonly at some stage of production or distribution, as in the case of tariff duties, and afterwards passed on (in the form of higher prices for commodities) to consumers who actually pay them, although often without being aware of doing so Back in the eighteenth century, the federal government started off by relying almost entirely on indirect levies, principally duties on imports, designed to shelter the country's developing industries as well as to yield revenue, and so satisfactorily were tax needs met in this way that until the Civil War direct taxes were invoked only three times, and even excise taxes (indirect) only in two brief early periods The exigencies of the conflict between the states, however, not only forced a temporary reversion to direct taxation, but brought excise taxes once more into use, and from then on these always had a place in the tax structure, although with tariff duties still for a good while dominant Sometimes the point was made that people would be more tax-conscious, and therefore more concerned about economy and efficiency in government, if taxation were less disguised But politicians always considered it good strategy to keep the federal tax burden well concealed

Later changes

Throughout a long period of our history, the country's tax structure thus was relatively stable, and for the times, reasonably satisfactory, state and local governments lived principally from the proceeds of the general property tax, the federal government principally from the yield of customs duties The past 40 years, however, have brought changes greatly complicating the picture Mounting expenditures, increasing inadequacy of the general property tax, tempting new sources of revenue like motor cars and gasoline, and newer tax ideas and objectives, have attracted the states to numerous forms of taxation rarely or never employed before, while, on its part, the federal government has revolutionized its tax pattern, with customs duties relegated to an insignificant position, and reliance now placed mainly upon levies on incomes, inheritances, and the production and consumption of goods The shift in the federal sphere came shortly before World War I, when, with the idea growing that the nation's principal tax should be based on ability to pay as measured in terms of individual and corporate incomes, this newer (although not wholly untried) form of levy, validated by the Sixteenth Amendment, established itself firmly in our system [12] One of the advantages of income taxation is its

[11] There have been only four instances of a presidential veto of a major revenue bill—all since 1944

[12] State taxation of incomes started slightly earlier—in Wisconsin in 1911

flexibility—the ease with which, by juggling a few rates and brackets, it can be made to yield vastly more or vastly less as desired, and under the impact of the then unparalleled wartime expenditures of 1917 18 the national revenue from this source was pushed to topmost place—a position which it consistently maintained until 1933 With depression conditions deepening in the early thirties, taxes on personal and corporate incomes yielded steadily diminishing returns, and once more the bulk of national revenue began to come from customs duties and excises, even though languishing commerce and slackened business caused these also to produce less than formerly Some measure of prosperity, however, having been regained the income tax stream began rising again in 1937, and under wartime tax legislation after 1941 it became a torrent, utterly dwarfing all other tax sources [13]

Principal taxes today

Governments cannot live without taxes, only governments can impose taxes, and theoretically they can impose them as long as the people have anything to tax From these simple propositions arise, however, multitudes of difficult questions—some (under a plan of government like ours) constitutional, but even more primarily economic or political For example What kinds of taxes are legitimate or appropriate? How energetically may the taxing power be wisely or safely used? How can adequate revenue be raised without "killing the goose that lays the golden eggs," in other words, impairing the volume of production, lowering the level of national income and undercutting the taxing power itself?

Income inheritance, gift, and excess profits taxes

By a wide margin, our principal federal tax is, of course, that on individual and corporate incomes Introduced in response to prolonged pressure from

income should pay in accordance with a graduated scale of taxable receipts Hence, for individuals, we have a graduated tax (paid by over 44 million persons in 1950) rising from low percentages on amounts under $2,000 to percentages in the high eighties on very large amounts, for there is no hesitation to take from the well to-do a proportion deliberately calculated to prevent piling up wealth as in earlier days Closely related, and working to the same end for family "dynasties," are graduated but stiff taxes on inheritances above $60 000, and, to reach wealth that otherwise might escape by being given away, similar "gift" taxes approximately three-fourths as heavy Corporations, too, are taxed as such on their ordinary incomes, and in addition, during World War II paid, and after an interval from 1945 to 1951, now again are paying "excess profits taxes," i e a special levy of 82 per cent on their profits over and above average annual earnings in the three most profitable years 1946-49 [13a]—a tax which during World War II reached a maximum of 95 per cent (on profits exceeding yearly earnings above the average for 1936-39), closely approaching downright confiscation

Excises and customs

Of course, the less well-off are not overlooked From a very modest level, they begin paying income taxes, and in some small way even persons too poor to be reached by those levies pay excise taxes injected somewhere along the line between producers and distributors on the one hand and consumers on the other To a degree, excises follow the principle of ability to pay inherent in the income tax, being most numerous and heaviest on articles of luxury and fuel, railroad tickets, amusements admissions, electrical appliances, automobiles, and cosmetics are but a few of the things taxed which many people of slender means would be slow to classify as luxuries [13b] Finally, there still are indirect taxes in the form of tariff duties, likewise concealed in prices paid for commodities by consumers on all economic levels; although since 1910, the yield of these historic imposts has slumped from top of the list to very near the bottom

The present tax load

In President Truman's budget for fiscal 1952, submitted to Congress January 15, 1951, appeared the following tabulation for a series of three years.

BUDGET RECEIPTS
(in millions)

| Source | 1950 *Actual* | 1951 *Estimated* | 1952 *Estimated* |
|---|---|---|---|
| Direct taxes on individuals | | | |
| Individual income taxes | $17,409 | $21,599 | $26 025 |
| Estate and gift taxes | 706 | 710 | 755 |
| Direct taxes on corporations | | | |
| Income and excess profits taxes | 10,854 | 13,560 | 20 000 |
| Excises | 7,597 | 8,240 | 8 222 |
| Customs | 423 | 600 | 620 |
| Employment taxes [14] | | | |
| Federal Insurance Contributions Act | 2,106 | 2,960 | 3 823 |
| Federal Unemployment Tax Act | 226 | 239 | 263 |
| Railroad Retirement Tax Act | 551 | 565 | 613 |
| Railroad Unemployment Insurance Act | 9 | 10 | 10 |
| Miscellaneous receipts | 1,430 | 1,325 | 1,333 |
| Deduct | | | |
| Appropriation to social security trust fund | —2,106 | —2,960 | —3,823 |
| Refunds of receipts | —2,160 | —2,336 | —2,703 |
| Budget receipts | 37,045 | 44,512 | 55,138 |

As in the case of expenditures, the swollen figures for 1951 and 1952 are, of course, attributable to the Korean war and to current defense mobilization In pursuance of a "pay-as-we-go" policy pressed upon the country by the Administration for the duration of the emergency, Congress in 1950 increased income taxes on individuals and corporations and likewise at the beginning of 1951 enacted a new schedule of corporate excess profits taxes; and these measures, designed to yield $7 8 billion, are reflected in the figures given

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armarked

above A glance at the 1952 estimates of expenditure would indicate, however, that, without additional revenue, a sizable deficit was in prospect, and early in 1951 Congress was asked for further increases calculated to yield $10 billion After extended consideration, the House voted an estimated $7 2 billion, the Senate $5 2 billion, and a compromise was reached on $5 6 billion, but with the White House protesting that the tax measure fell far short of meeting the deficit since appropriations for 1952 exceeded the original budget requests

The problem of multiple taxation

With both nation and states—to say nothing of cities also—reaching out in recent decades for new sources of revenue, it naturally has come about that frequently they are found taxing the same objects, in a recent year, indeed, no less than 90 per cent of federal and state receipts came from the same sources To be sure, the federal government leaves the general property tax entirely to the states (principally for local use) and relies for the major part of its revenue upon personal and corporate income taxes, estate and inheritance taxes, and consumption taxes of different kinds But nearly all of the objects affected are taxed by some or all of the states as well, indeed, apart from the general property tax, there are few if any important forms of taxation to which both the national and state governments do not lay claim, each without much regard to the other or to the taxpayer, and often the sums collected by the national government within a state from a given tax exceed the amounts collected from that tax by the state itself [15] Persons finding their salaries or the gasoline they buy taxed twice sometimes harbor an idea that such double tax loads are unconstitutional In this they are wrong Not only does the constitution have nothing to say against double taxation, it in effect presupposes it by leaving broad and general taxing powers to two largely independent governments, both resting directly upon the people Even though not unconstitutional, however, the existing situation imposes handicaps on business and industry and sometimes excessive burdens on individual taxpayers, and one will not be surprised to learn that a good deal of thought has been devoted to it not only by tax experts but by business organizations, taxpayer associations and state officials In a period, nevertheless, when all governments instinctively shy away from proposals looking to drying up sources of revenue, remedies are not in sight

## BORROWING MONEY—THE NATIONAL DEBT

Borrowing power and methods

When expenditures and revenues are approximately equal, a government is said to have a 'balanced budget If, on the other hand, expenditures exceed receipts, there is a deficit, and the budget is said to be out of balance In ordinary times, and for ordinary purposes, income derived from taxation, supplemented by receipts from non-tax sources, ought to be, and usually over the stretch of years has been, sufficient to meet the federal government s needs

In time of war or threat of war, however, or other unusual strain, e g, a depression, or to meet the cost of some special undertaking like the Panama Canal or a program of foreign aid, borrowing must be resorted to, and the accumulated obligations thus incurred give rise to the national debt

Power to borrow not only is expressly conferred in the constitution,[16] but is one of the very few federal powers entirely unencumbered by restrictions—with the result that Congress may borrow from any lenders, for any purposes, in any amounts, on any terms, and with or without provision for the repayment of loans, with or without interest The method commonly, is that of *selling securities—usually in the form of interest-bearing long term bonds or* short-term treasury notes or certificates—to banks, corporations, and individuals as voluntary purchasers, and such securities rate high in the money markets, not only because they usually pay attractive interest as conservative investments go, but because the national government (unlike some of the states) never has repudiated a debt If, however, in time of special need the investment motive, reenforced by patriotic appeals and high-pressure salesmanship, fails to bring about voluntary purchases in sufficient amounts, the government may compel purchases by "deferred-saving" devices of one kind or another

The national debt since 1916

In the past decade and a half, the United States has been added to the long list of countries laboring under the burden of a huge national debt As recently as 1916, on the eve of our involvement in World War I, we were paying interest, as a nation, on less than $1 billion[17] Three years of war financing raised the figure to above $25 billion Peace restored, extensive borrowing ceased, and in a period of what was looked upon as unparalleled "prosperity," national revenues, notwithstanding lower tax rates, exceeded national expenditures, year after year, permitting substantial debt retirement By the end of 1930, we owed only a trifle over $16 billion With a little more sacrifice during lush days, the whole of this might have been liquidated, and, as we now are situated, it is a pity that we did not put forth the effort

Already, however, the effects of the great depression were being felt widely, both by governments and by private persons and corporations Revenues fell off sharply, outlays for relief and related purposes mounted to new heights under a policy of "spending itself into prosperity," the country went on from a national debt of $29 billion in 1935 to one of $42 billion on June 30, 1940, when for the twelfth successive time the government closed a fiscal year with a formidable deficit

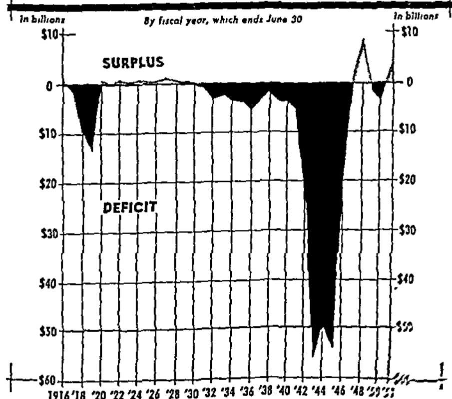
But worse was yet to come In the autumn of 1939, a major war broke out in Europe, accompanied by grave developments in the Far East, and for two years each succeeding month brought the conflict nearer our own shores—until, finally, in December, 1941, we found ourselves actually at war with the three principal totalitarian states Regardless of deficits, therefore, the country was compelled to tighten its belt and undertake, first, a *defense* program (on land and sea and in the air) which alone would have

[16] Art I § 8 cl 2
[17] This of course, takes no account of the debts of states and their subdivisions

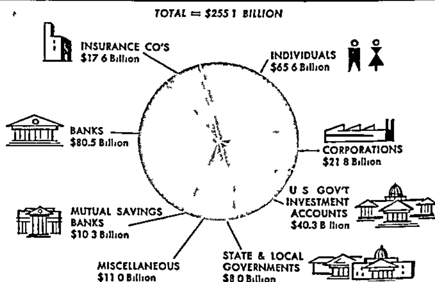
removed all possibility of a balanced national budget for many years to come, and afterwards a *war* effort whose cost and resulting liabilities mounted to fantastic heights. Notwithstanding heavily increased taxation, the national deficit for the year ending June 30, 1941, soared to $5.1 billion and the gross national debt to $48.9 billion—an increase of nearly $6 billion in a single year. And that was while we still were at peace. Within two months after Pearl Harbor, the $60 billion mark was passed, in December, 1942,—with the country at war only a year—the figure was close to $100 billion, by June 30, 1943, it exceeded $140 billion, in December, 1944, it stood at $231 billion, and at the end of February, 1946 (though half a year after the surrender of our last totalitarian foe), it reached a peak of $279.7 billion, entailing a yearly interest charge of almost $5.5 billion—enough to have covered all annual expenses of the government 20 years previously.

The problem of liquidation

People who thought seriously about such matters were by no means of one mind on how a debt of such proportions might be expected to affect the country's future. Some, comforted by the circumstance that we "owed the debt to ourselves" and not to foreign lenders, thought that, with reasonable



national prosperity, the burden could be carried and the debt itself gradually reduced with no perceptible lowering of living standards Others could not see how owing the debt to ourselves made any great amount of difference (we still *owed* it), or how the dead weight of so stupendous an obligation could fail to retard economic and social progress over a long period of years Certain it was that generations as yet unborn would feel the impact of debt burdens which we in our time have improvidently piled up Certain




it was also that the least that this generation could decently do, for its own good as well as that of its successors, was to whittle down the burden as rapidly as possible, by not only scrupulously meeting all interest charges as they fell due but paying off principal whenever the state of the national income permitted And on this latter policy the country resolutely embarked Favored by a very high level of national prosperity, as well as by a combination of fiscal circumstances too complicated to be explained here, the government contrived to reduce the debt by the middle of 1949 to $251 6 billion

The outlook

How rapidly liquidation would proceed from there was, however, problematical Financial experts computed that, beginning in 1947, approximately $5 25 billion a year would have to be paid on principal to wipe out the debt in 50 years No one ever expected such a pace to be maintained, indeed, it was recognized that the country would be fortunate if in that time it did not encounter too many periods in which the debt could merely be "serviced," *i e*, interest paid, with no reduction of principal at all, or even with an increase from "deficit financing" Moreover, in 1950 we entered precisely

such a period—with war in Korea and a new defense mobilization threatening, in spite of heavier taxes under "pay-as-we-go" planning, to prolong it indefinitely, and with a figure of $255 1 billion in May, 1951, already pushed up to $259 6 billion by November 27, 1951, and expected to reach $262 5 billion by the end of the fiscal year 1952

There is a school of opinion holding that we ought not to expect in our day to do much more than simply "maintain" the debt, paying interest scrupulously, but not making much effort to reduce principal, with the country meanwhile "growing up" to the debt by attaining such population and wealth that, proportionally, the burden would in time be materially reduced Such rationalization of our current lack of progress with debt reduction (almost as unrealistic in one direction as, in another, it is to expect the country ever to be literally debt-free) certainly does not appeal to most thinking people, who must find comfort rather in reflecting that, over the years—and barring such shattering disasters as an atomic war—rich resources, growing population, superb technical skills, and unsurpassed potentialities of wealth ought to enable us to handle the debt as debts are supposed to be handled by responsible people, and at least to reduce it to far less burdensome proportions

## THE CURRENCY

Constitutional provisions

During the Revolution and under the Articles of Confederation, the country had sorry experience with everything relating to currency Small wonder, therefore, that the constitution s framers in 1787 considered one of the first needs of the new nation to be a sound and uniform currency system, or that they wrote into the document two significant clauses directed to that end—one giving Congress full authority to "coin money [and] regulate the value thereof," the other forbidding the states to "coin money, emit bills of credit, or make anything but gold and silver coin legal tender in the payment of debts "[18] Regulation of the currency was not to be among governmental functions shared by nation and states

A national currency is established

Dating from legislation of 1792, our first uniform national currency was based upon the now familiar decimal system, with the dollar as a unit, and consisting of coins manufactured from the two precious metals, gold and silver, with 15 ounces of the latter reckoned as equivalent in value to one ounce of the former In later years, fluctuation of the two metals in the world market produced difficulties, and in 1873—the ratio between the two in our currency system having in the meantime been changed to 16 to 1—Congress "demonetized" silver by wholly stopping the coinage of silver dollars. With the Democrats, led by William Jennings Bryan, demanding remonetization at 16 to 1, the presidential campaign of 1896 was waged almost exclusively on the currency issue Not only, however, was the fight lost, but a Republican Congress and president in 1900 placed on the statute-book a "gold standard" act making the gold dollar the standard of value and requiring that the value

[18] Art I, § 8, cl 5 Art I, § 10, cl 1

of all other money be maintained on a parity with gold, so that a silver dollar or a paper dollar might be taken to the Treasury and redeemed at face value in the yellow metal

The system revolutionized in 1933-1934

The average person may hardly have realized it, but the depression of the thirties became responsible for a number of important changes affecting the monetary use of the two metals (1) in 1933, the gold standard, under which since 1900 all money had been maintained on a parity with gold, was abandoned, (2) in the same year, the "gold clause" then commonly written into long term bonds and contracts, both public and private, and calling for the payment of principal and interest in gold coin, was likewise given up, (3) in 1934, the gold content of the gold dollar was reduced by somewhat over 40 per cent, in effect giving the country a "59-cent dollar",[19] (4) in the same year, gold was "nationalized," i e, the federal government took over the country's entire stock with a view to coining no more, but merely holding bullion as a permanent metallic base for paper currency,[20] and (5) a Silver Purchase Act "nationalized" the white metal also by authorizing government purchases up to a point where the total metallic reserve would be three fourths gold and one fourth silver

Paper money introduced

The constitution speaks only of coining money, without a word about paper currency—except to forbid the states to issue it Such currency nevertheless, was in circulation after 1789 as before The first and second Bank of the United States (while existing) issued notes and state banks did likewise, even though their issues often were of shifting and uncertain value Even before the Civil War, too, there was some demand that responsibility for paper money be centralized in the national government, and when difficulty was encountered in floating loans for carrying on that conflict, Congress took the momentous steps of (1) authorizing, in 1863, the government itself to issue paper currency (soon known popularly as "greenbacks"), and (2) instituting, in the same measure, our later system of national banks, empowered to issue notes up to 90 per cent of their holdings of United States bonds—following two years later with a 10 per cent tax on notes of state banks designed to prevent further issuance of them The right of Congress to authorize paper currency not redeemable in gold or silver, and particularly to make it legal tender for private as well as public debts, was sharply challenged, but in 1884 it was fully upheld in an important series of actions commonly known as the Legal Tender Cases

Present forms of currency

As an outcome of its rather tortuous history, the American currency system is more complicated (with, for example, more forms of paper) than some of those abroad Nevertheless, with certain varieties, e g, gold coins and gold certificates, eliminated and certain others, e g, notes of national banks, nearly all called in, it is simpler than it used to be, and—what is more important—since 1933 all forms have been legal tender and on a parity with one another, so that no one need hesitate to accept payment for goods or services in whatever type of lawful currency is offered Currency now in

[19] The president's power further to devalue the dollar expired in 1943
[20] In 1951, gold bullion to a value of $21 8 billion was thus held

general circulation consists of (1) three principal forms of paper (a) United States treasury notes, in no very large quantity, (b) silver certificates backed by silver bullion held by the Treasury, and—by far the most important—(c) federal reserve notes, issued by federal reserve banks in denominations of five dollars and upwards, (2) silver dollars, not much used (with paper dollars available) except in the West, and (3) fractional currency, facilitating small transactions and making change (a) silver half dollars, quarters, and dimes, and (b) subsidiary or token coins in the form of nickels and pennies

## THE NATIONAL BANKING SYSTEM

*Beginnings*

From the constitution's silence on the subject of banking, strict constructionists of early days deduced that the matter was one for regulation solely by the states Under Federalist leadership, however, a national bank, known as the Bank of the United States, was established in 1791, and, its charter having expired in 1811, a second institution of the kind was set up in 1816 Moreover, when the latter's constitutionality was challenged, the Supreme Court, in the celebrated case of McCulloch *v* Maryland (1819), availed itself of the doctrine of implied powers to put practically beyond question the authority of Congress to create banking corporations From the time, it is true, when the second Bank of the United States closed its doors in 1836 until the Civil War, the field was left entirely to banking institutions chartered under widely varying state laws But the need for a currency of uniform value throughout the country, together with desire to facilitate the sale of government bonds on favorable terms during the war, led Congress in 1863-64 to institute a long-delayed national banking system, comprising banks throughout the country chartered regulated, and inspected by national authorities, and empowered to issue notes designed to circulate as money Indeed, with issuing of such notes by state banks simultaneously stopped by taxation, the right to issue notes became a monopoly of the new national banks, and such it remained until creation of the federal reserve system in 1913 State banks nevertheless continued to exist and to carry on a great deal of business, side by side with national banks, and so they do today [21]

*The federal reserve system*

Originally, national banks were entirely separate establishments, with no more means of coming to one another's relief in time of stress than railroads or merchandising enterprises, and from the ups and downs of business during recurring cycles of prosperity and depression flowed embarrassments and failures which often might have been prevented To remedy this situation by linking up all national banks in an integrated series and imparting greater elasticity to their operations, Congress, in 1913, enacted a law creating what is known as the federal reserve system [22] Under this centralizing measure, the country is divided into 12 districts, in each of which is located a federal reserve bank, usually in the district's principal city, and doing business not,

[21] Federal land banks federal home loan banks and the like—designed to extend cred t to particular categories of borrowers—stand outside of the regular system of commercial banks here in m nd See pp 432 and 475 below

[22] 38 *U S Stat at Large* 251

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# CHAPTER 25

## Commerce—Transportation and Communications

Government under modern conditions is law and politics and management operating chiefly in a field of economics, and as we pass from such federal activities as taxing, spending, borrowing, and providing currency, banking facilities, and credit, and turn to commerce, general business, agriculture, conservation, labor, social security, and the like, we still shall be exploring ways in which government encourages, aids, regulates, and directs the economic life of the nation We start with commerce, because, aside from taxing and spending, the marvellously elastic commerce power is the key that unlocks the greatest number of doors to federal control

### COMMERCE UNDER THE CONSTITUTION

The commerce clause

Lack of any central power to deal with the conditions under which commerce was carried on with foreign countries and among the several states was a principal defect of the Articles of Confederation, and it was a controversy between certain of the states over conflicting commercial interests and policies that set in motion the train of events leading to the convention of 1787 It is not strange, therefore, that the delegates assembled at Philadelphia should have been particularly concerned about supplying a remedy, and this they did by writing into the new constitution a brief but fertile clause giving Congress power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes' [1] Indeed, this power stands second in the list of those conferred, and while no one at the time could have foreseen such a result, it is doubtful whether any other of the constitution's provisions (except, as suggested, those relating to taxation and expenditure) has paved the way for an equal amount of legislation or contributed so much to the vigor of the national government as we know it today Certainly none has had so much to do with bringing general business under present federal controls

Expansion by judicial interpretation

Commerce carried on wholly within the bounds of a state is left to be regulated exclusively by the state concerned Federal power over all other commerce is, however, granted in broad and general terms, while of four express limitations imposed, only one—that forbidding Congress to lay a tax

[1] Art I, § 8 cl 2

or duty on exports from any state—has proved of much importance[2] It is true that to men of pack-horse and sailing ship days, commerce meant only *traffic in goods* and that even after the Supreme Court, in the famous case of Gibbons v Ogden in 1824, expanded the concept to include *intercourse, e g* the carrying of persons, the federal power still was construed as extending only to commerce in a rather strict and literal sense The conditions, for example under which commodities handled in foreign and interstate trade were produced (including low wages, long hours, and perchance the employment of child labor) were not supposed to fall within its scope Even this guarded construction, however, permitted regulating authority to be progressively broadened as inventions gave rise to new modes or forms of commerce *e g* railroad transportation, telegraph and telephone services, motor transportation radio-broadcasting, aviation, and finally television, and within the past two decades a "liberalized" Court, discarding earlier concepts, has opened a vast additional realm by holding manufacturing, mining, and lumbering, if raw materials and finished products are carried in interstate commerce to be inseparable from such commerce and therefore within the scope of federal regulative power Since 1944, too, private insurance business, previously considered exempt, has been included

Present meaning of "commerce" and "regulate"

Constitutionally "commerce" today therefore embraces not only the exchange of commodities but the transportation of them, and of persons and livestock, by land water, or air, the transportation of gas and oil through pipelines, the transmission of intelligence by telegraph, telephone, wireless radio, television and newspapers manufacturing, mining fishing, and lumbering when having interstate aspects commercially, and the writing of insurance policies—and all are subject to congressional regulation in so far as involving interstate or international operations Even agriculture is drawn in, not only as its products flow through the channels of trade, but in such extraordinary ways as the exclusion of commodities from interstate commerce as a means of controlling production and the fixing of prices for products "in the current" of interstate commerce

The term "regulate" also, has undergone judicial interpretation and expansion From having denoted merely power to permit and control commerce under certain conditions it has come to include authority to protect and safeguard it and, on the other hand, to prohibit it altogether when national interest so requires Furthermore, Congress not only may regulate existing instrumentalities of interstate and foreign commerce, but, under the power to promote may charter new corporations to serve as such instrumentalities In short, as a result of the commerce clause and of judicial decisions based upon it, Congress has authority to enact any legislation appropriate for not only controlling but also advancing commerce, so long as interstate and foreign—full power "to adopt measures to promote its growth and insure its safety, to foster, protect, control, and restrain"

[2] Art. I § 9 cl 5
[3] 9 Wheaton 1

## THE REGULATION OF FOREIGN COMMERCE

In its provision for regulation, the constitution brackets foreign commerce and interstate commerce in the same phrase Authority over foreign commerce, however, is broader than over interstate, for the exclusive and practically unrestricted jurisdiction of the national government over our relations abroad applies to commerce no less than to everything else and, of course adds materially to the regulative power conferred in the commerce clause—in addition to opening up methods of dealing with commerce otherwise than by congressional act, *e g* by treaty [4]

Scope

Authority to regulate foreign commerce, furthermore, extends to every act of transportation or communication cutting across our national boundaries, no matter how deep in the country's interior may be the point of beginning or termination A cablegram to England sent from Chicago is foreign commerce from the time it is first placed on the wires, a consignment of ladies' gowns from Paris to Cleveland is foreign commerce not simply until it is unloaded from a ship or airplane at New York, nor even simply until it reaches Cleveland, but until the importer has sold the original package or at least broken it for the purpose of selling its contents Only (ruled the Supreme Court more than 100 years ago) when imports—the original package or its contents—have "come to rest," and are commingled with the general property of the people of a state, does the controlling authority of Congress end and that of the state begin [5]

Regulations of foreign commerce which Congress has enacted (or may enact) may be divided into (1) those designed to promote trade, or at least shipping, (2) those aimed at restricting or preventing trade, and (3) general rules looking to safety and convenience

1 Promotion of trade and shipping

It would be difficult to name any national policy which the government of the United States has pursued longer and more consistently than that of protecting and promoting the foreign trade of our people The very first Congress passed acts with this in view, and to a considerable extent the legislative and diplomatic history of the country from that day onwards could be told in terms of efforts to open new markets for American goods abroad, to secure and maintain equal opportunity for American traders, and to build up relations and agencies calculated to promote these ends Both the diplomatic and consular branches of the Foreign Service have been, and still are, employed to assemble and transmit needed information The Department of Commerce—especially through its bureau of domestic and foreign commerce—built up, in the later twenties, a world wide corps of special commercial agents, even if somewhat curtailed during the following decade And the entire international policy of President Franklin D Roosevelt, although far transcending

power to

ages" still

the interests of commerce, was designed, along with other and greater objectives, to make the United States more of a trading nation than ever in the past

(a) Laws encouraging trade

As even this brief enumeration suggests, the encouragement of foreign trade is the business of no single branch or agency of the government, responsibility is shared, instead by the president, several of the executive departments, many bureaus and services, and of course Congress Naturally, there is a close connection with managing the country's foreign relations, and this puts the president in a position to take much of the initiative Without congressional legislation and appropriations, however, important policies usually cannot be carried out, and over the years long lists of laws, inspired from the White House or otherwise, have contributed by such means as (1) authorization, in the Webb-Pomerene Export Trade Act of 1918, of exporters to form and operate associations, or quasi cartels, which otherwise would be in violation of the anti trust laws, (2) permission of national banks having a capital and surplus amounting to $1 million to establish branches in foreign countries to facilitate business relations, together with assent to an executive order of 1934 establishing a special bank in Washington—the Export-Import Bank—"to facilitate exports and imports and the exchange of commodities between the United States and other nations", (3) enactment of a reciprocal trade agreement law in 1934 (seven times renewed since) conferring on the president wide latitude in stimulating trade by reducing tariff duties, and (4) approval and sustained support of the Marshall Plan for European rehabilitation, an important feature of which has been the rebuilding of active trade relations between the United States and war-stricken nations abroad

(b) Laws encouraging shipping

Important legislation, too, has been aimed not only at increasing exports and imports but at encouraging the transportation of them in American ships, and this effort has taken two main forms (1) tonnage duties or taxes based on the cubical capacity of vessels arriving in American ports from foreign countries and graduated so as to fall more heavily on ships built or owned abroad than on American vessels (or, in lieu of such, discriminative duties on foreign goods imported in any but American vessels), and (2) laws for the encouragement of an American merchant marine Under impetus supplied by World War I, Congress in 1916 created a United States Shipping Board for the purpose of developing a greatly needed naval auxiliary and merchant marine, and during the twenties the Board's powers were expanded along lines more directly related to the promotion of peacetime commerce Direct subsidies to private steamship lines—such as have been common in foreign lands—have traditionally been opposed in this country Nevertheless, between 1928 and 1936, substantial subsidies, in disguise, were provided, chiefly in the form of lucrative contracts for carrying the mails overseas, and in the latter year direct and heavy subsidizing was introduced under terms of a Merchant Marine Act whereby the government engaged (1) to reimburse shipbuilders for any cost of building merchant ships (for use in foreign trade) in American shipyards over and above the cost of building in foreign shipyards, and (2) to make up to ship owners and operators the full difference between the cost of operating American and foreign vessels competing for the same

overseas business The same act created an independent United States Maritime Commission of five members appointed by the president and Senate and charged with buying, selling, and building ships, operating the subsidy system, and regulating rates, fares, and practices of common carriers engaged in foreign commerce, just as the Interstate Commerce Commission regulates carriers by water in inland and coastwise commerce Under a reorganization plan submitted by President Truman, the Commission was, however, abolished in 1950 and its functions transferred to a Federal Maritime Board of three members in the Department of Commerce

2 Restriction or prohibition of foreign trade

Of congressional regulations restricting or prohibiting foreign trade, only three types need be mentioned One is tariff laws, which, when aimed primarily at protecting home industries restrict both imports directly and exports indirectly, since ordinarily foreign peoples cannot buy in the American market unless they also can sell A second type takes the form of limiting (or in the case of persons not eligible for naturalization, forbidding outright) the immigration of aliens into the United States A third, and more drastic, type is embargoes, such as have been laid several times in our history (*e g*, in 1794, in 1812, during World War I, and during the Far Eastern disturbances of recent years), suspending commerce completely with all or specified countries or (perhaps under some export licensing plan) in specified commodities Sometimes the object has been to lessen the likelihood of the United States being drawn into a foreign war, or to serve as a weapon in a war actually going on, sometimes, to prevent aid being given (as by exports of arms) to revolution or aggression in a foreign country, sometimes—as during the defense effort preceding our involvement in World War II—to conserve materials and products urgently needed for our own country's security, sometimes to prevent strategic materials reaching countries known to be hostile to us, sometimes—as during the period of industrial reconversion after 1945—to prevent undue depletion of our domestic supply of given commodities vital to our general economy as well as to our defense In any event, the power to impose such restrictions resides in Congress—although (as in 1940 and on other occasions) the president may be permitted to exercise it under delegated authority, or even in turn to delegate it to departments, agencies, or officials

Regulations promoting safety or convenience

Perhaps the largest and most varied class of congressional regulations relating to foreign trade is that consisting of navigation or inspection laws, enacted by the First Congress and on numerous occasions since Objects in mind have been the protection of American shipping, the stimulation of shipbuilding, safeguarding the health and safety of passengers, and promoting the well being of seamen Notable among measures having the last-mentioned purpose is the LaFollette Seamen's Act of 1915

## TARIFF POLICIES AND FOREIGN COMMERCE

The changed [illegible]

Before turning from foreign to interstate commerce, something more should be said about tariffs as a factor in the regulation of our trade abroad, for although the general purport of a system of customs duties such as the

United States has traditionally maintained—and commonly aimed primarily at protecting the producer against foreign competition [6] rather than at revenue—is to restrict trade, and even stop it if the rates are high enough, the reverse side of the picture is that by lowering duties (as in later years we have been systematically doing) trade may also be promoted

1 Faults of earlier tariff making

A generation ago, tariff making solely by act of Congress—never very satisfactory—was found no longer tolerable Responsibility for decisions was too much diffused between the two houses, special interests and their lobbyists exerted too great influence general tariff bills had become such labyrinths of facts and figures that even the most conscientious congressman could not inform himself on more than a minor fraction of the provisions on which he was expected to vote Furthermore, regardless of how well considered any set of schedules might be when first adopted, fluctuations of prices in the world market might render it unsatisfactory almost before the ink was dry on the statute Obviously, the need was for tariffs that not only would be more flexible—capable of quicker adaptation to changing situations—but based on more comprehensive exact, and up to date information, and in 1916 a good start was made when a United States Tariff Commission was set up, composed of six members representing both leading parties and charged with continuous investigation of all economic matters bearing upon tariff policy, and with reporting in full to both the president and Congress

2 Flexible tariff arrangements introduced

Independently the Commission never has had power to make changes in tariff laws or the administration of them, and originally it had authority to supplement the information it imparted with no recommendations except of the most general sort The Fordney McCumber Tariff Act of 1922, however, not only charged it with investigating differences in the cost of production of any domestic article and any like or similar foreign article, but required it to recommend to the president specific increases or decreases in tariff rates, and the president, in turn was authorized to change rates, either up or down, within a range of 50 per cent, with no intervention from Congress The effect was to give us for the first time a flexible tariff—one that enabled differentials between costs of production here and abroad to be counterbalanced without awaiting the slow and uncertain results of legislation

3 The trade agreement system

More, however, was to come Tariff revision by the procedure described still was cumbersome the president could act only on recommendation of the Commission, like most such bodies, the Commission was prone to move slowly, and its recommendations could apply only to specific articles, without embodying any general program Moved by these limitations, and by the urgency of stimulating our foreign trade as the depression deepened, President Franklin D Roosevelt asked for, and Congress in 1934 passed, a Reciprocal Trade Agreements Act [7] giving the chief executive broad authority to bargain with foreign countries for mutually advantageous trade agreements, with reciprocal tariff concessions made, and without need to submit them to the

[6] By taxing foreign produced imports heavily enough to offset any price advantage they otherwise would enjoy in competition with similar American produced articles

[7] 48 *U S Stat at Large* 943 Technically the measure was an act to amend the Hawley Smoot Tariff Act of 1930

Senate as long as certain conditions were met Articles on the dutiable list might not be transferred to the free list, or *vice versa* no rates might be lowered by more than 50 per cent, the "most favored nation' principle must be preserved,[8] and before any agreement with a foreign government was concluded, interested parties must be given opportunity to present their views Otherwise, the president, operating through an appropriate arm of the State Department, and often with information and advice from the United States Tariff Commission, might act freely Renewed in 1937, 1940, 1943, 1945, 1948 (in somewhat weakened form and for but a single year), in 1949 (in less restricted form), and most recently in 1951 for two years (with many restrictions attached), the plan went far toward achieving its purpose, with trade agreements in operation or impending by 1951 with 45 different nations and the general level of our tariffs (except on certain major commodities like iron, steel, and wood) down almost to that prevailing under the low tariff Underwood Act of 1913 [8a] Every renewal of the legislation has been vigorously contested by interests believing themselves injured, or at least threatened, as well as by elements in Congress and outside opposed in principle to such a surrender of our historic protectionist policy and, with it, of the economic self sufficiency which national security in these times is regarded as requiring On the other hand, the plan in general enjoys substantial support, the world situation calls urgently for keeping international trade at the highest possible level, and it seems safe to assume that, in one form or another, the reciprocal trade agreement will remain the dominant device, in lieu of old style tariff laws, for determining under what conditions the goods of foreign countries may be brought in at our ports When secretary of state, General George C Marshall rightly termed it 'the cornerstone and keystone of our foreign economic policy "[9]

## THE REGULATION OF INTERSTATE COMMERCE—PRINCIPLES

What is interstate com merce?

With slight qualifications to be mentioned presently, the control of commerce begun, wholly carried on, and completed within a single state falls exclusively to the authorities of that state[10] If, however, at any stage an action construed to be commerce—a trip, a shipment, a message—passes from one state into another, it ceases to be intrastate and becomes interstate commerce

[8] That is concessions extended to one country must be extended to all others participating

the moment it is started with federal control beginning to apply Not only does the interstate aspect attach to a shipment of goods, under such circumstances, as soon as it is delivered by the shipper at the freight office, warehouse, or depot of a common carrier, *i e*, a railroad, steamship, aviation or express company but by judicial interpretation it adheres to the transaction throughout the entire journey and until the goods have "come to rest" in possession of the consignee

Scope of national regulation

Even before starting or extending operations, a corporation or other establishment engaged however slightly, in interstate transportation must obtain from the Interstate Commerce Commission or other proper authority a "certificate of convenience and necessity" entitling it to do business, and once functioning, it will find the securities it issues, the services it renders the rates it charges the wages it pays the accounts it keeps, and nearly every thing else largely or completely regulated by public authority A railway company may be required to equip its trains with safety appliances, to reduce the number of hours a day which its employees work, to bargain collectively with employees' representatives and to contribute to a pension fund for superannuated employees, and all of these things have been done Moreover, just as there may be embargoes upon foreign commerce, so there may be restrictions, or even outright prohibitions, of commerce among the states "Congress," the Supreme Court has said, "can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as a means of promoting immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin" In doing this, it is "merely exercising the police power for the benefit of the public, within the field of interstate commerce", and in accordance with this view, the transportation from state to state of lottery tickets, "filled" milk, stolen property, women for immoral purposes, and securities handled by dealers neglecting or refusing to register, has been totally outlawed

Relation of state and national control

Of a vast number of commercial transactions, it is easy to say that they are wholly subject to state control, and of others it is equally easy to say that they are clearly of an interstate nature, and if all could be classified so readily, few if any doubts about the respective jurisdictions of state and federal authorities in this field would arise Much difficulty of the kind, however, has been experienced, because many transactions unfortunately cannot be made to fit into either of two such mutually exclusive categories In practice, state regulations many times affect interstate commerce, as for example when engineers operating through as well as local trains are required to be tested for color blindness or when the property of interstate carriers located within a state is locally taxed On the other hand, if cars employed only in local transportation are hauled as part of a train along with cars used in interstate transportation, they must be equipped with safety appliances required by the federal Safety Appliance Act, lest they impede or endanger interstate transportation, and in order to protect carriers against low intrastate rates that might throw an undue burden on interstate traffic, state-made railroad rates lower than interstate rates invariably are invalidated by the federal courts

So long as judicially considered constitutional, national regulations take priority over state regulations, and the result is to place all instrumentalities of interstate commerce, even though engaged in intrastate business as well, under at least potential federal regulation As for state regulations (apart from rates) impinging on interstate commerce, two main things can be said (1) If they are challenged, and the Supreme Court regards their chief purpose as protection of the health or safety, or promotion of the convenience, of the state's own inhabitants, or considers them primarily of only local application, they are likely to be upheld as not amounting to an invasion of the authority of Congress But if they are viewed otherwise, they almost certainly will be overruled (2) Regardless of their nature, state regulations may legitimately be imposed and enforced in situations where federal power to regulate clearly exists, but is not exercised, as for example in the interstate insurance business, where Congress not only does not exercise its recently (1944) declared power to regulate, but has definitely encouraged and authorized the states to continue to do so

## INTERSTATE TRANSPORTATION

1 Railroads

(a) The Interstate Commerce Act (1887)

Aside from land grants to railroads and appropriations for the improvement of rivers and harbors, little national legislation affecting interstate commerce was enacted until some 65 years ago Railroads naturally took on an interstate character at an early stage of their development, but while federal lands and subsidies were lavished upon them, regulation of their operations long was left entirely to the states Only after the Civil War, when railway building set in on a greatly increased scale and the inadequacy of state regulation became increasingly manifest did demand arise, especially among farmers, for control over them by national authority The upshot was the passage by Congress, in 1887, of an Act to Regulate Commerce,[11] first of a long series of national statutes under which is now regulated all interstate commerce carried on by railroads, by common carriers [12] by water (both inland and coastal), by express companies, by sleeping car and other private car companies, by freight forwarders, by motor bus companies, and by pipelines except those for the transportation of gas and water, likewise, bridges, ferries, car floats, and lighters, and indeed terminal and other facilities of whatsoever character when used in the interstate transportation of persons or goods Until 1934, the act applied also to facilities used for the transmission of intelligence by means of electricity such as telegraph, telephone, cable, and wireless systems These, however, now are provided for in a separate Communications Act, and, as we shall see, air-borne commerce and radio-broadcasting likewise have their separate laws and distinct administrative authorities

(b) Restrictions imposed

Upon railroads and other instrumentalities of public service subject to the basic law are imposed numerous restrictions, each prompted by some earlier abuse Thus

[11] 27 *U S Stat at Large* 379
[12] Carriers whose service is "common in the sense of being open to a

1 Rates for the transportation of persons and freight must be just and reasonable, and calculated to yield a "fair return" on the value of the property employed

2 Charging a higher rate for a short haul than for a long one over the same line in the same direction is forbidden, except in special instances when approved by the authority enforcing the general law, *i e*, the Interstate Commerce Commission

3 Rebating, directly or indirectly, and undue discrimination or preference between persons corporations, or localities are prohibited

4 Free transportation may be granted only to narrowly restricted classes of persons

5 Railroads are forbidden, except in a few special cases, to operate, own, or control, or to have any interest in, any competing carrier by water.

6 Except under strict supervision of the Commission, competing lines may not combine, merge their receipts, and apportion resulting profits [13]

7 Carriers may not transport commodities (except timber and its products) in which they have a direct property interest

8 Carriers may issue long term securities, purchase or build additional lines, or abandon old lines only with the Commission's consent

(c) Duties imposed

In addition, numerous positive duties are prescribed For example:

1 Printed schedules of rates must be kept open for public inspection, and changes in them may be made only with consent of the Interstate Commerce Commission

2 Full and complete annual reports must be made to the Commission, covering such matters and arranged in such form as it may require

3 All accounts must be kept according to a uniform system authorized by the Commission

4 In case of injury to any of its employees while on duty, a carrier must grant pecuniary compensation, unless the accident was caused by willful act or negligence of the injured party

5 The standard or basic work-day for railway employees engaged in the operat[illegible] wage schedules

[illegible] with automatic safety appliances

7 All railway companies (and their employees) must contribute to a fund in the federal treasury from which employees receive superannuation benefits, death benefits, and unemployment compensation

(d) The Interstate Commerce Commission

The Interstate Commerce Commission—earliest of the great federal regulatory commissions, and charged with enforcing the regulations indicated and many lesser ones as well—consists of 11 persons appointed by the president and Senate for seven-year terms, and has a staff of some 2,200 clerks, attorneys, examiners, statisticians, investigators, and technical experts, organized under five main divisions and in 16 different bureaus, each with a director or chief reporting to one of the commissioners The commissioners themselves work almost entirely in panels of commonly three members each, and a decision of a panel has the same force and effect as a decision of the Commission itself—subject to the entire Commission granting a rehearing Any

[13] A long pending Interstate Commerce Act Amendment (Reed Bulwinkle) Act of 1948 passed over a presidential veto nevertheless gives competing railroads freedom to proceed in concert in matters relating to rates and in effect exempts them from anti trust proceedings so long as the Interstate Commerce Commission approves what they do

person, corporation, municipality, or other private or public group may lodge with the Commission a complaint concerning any alleged infraction of the interstate commerce laws, and the Commission, acting ordinarily through one of its panels, must institute an inquiry If preliminary investigation discloses that the complaint may be well founded, a hearing follows, of a sort not unlike those to be observed in a court of justice plaintiff and defendant are represented by attorneys, books, papers and other materials are placed in evidence, witnesses are examined, and at the end the Commission, *i e*, in most instances the appropriate panel embodies its conclusion or finding in an order enforceable in the federal courts

(e) Control over rates

Under the original law, the Commission did not have power to make or revise rates, either on its own initiative or on complaint of shippers that existing rates were unreasonable Ultimately, however—although only after a vigorous campaign of popular education and in the face of persistent opposition from the carriers—the necessity of conferring extensive rate making power was brought home to the national mind, and under transportation acts of 1906 and 1920, the Commission (as agent of Congress for the purpose) is authorized, on complaint and after hearing, not only to fix "just and reasonable" rates, regulations, and practices, *but also* to prescribe definite maximum or minimum, or both maximum and minimum, charges

2 Inland and coastwise water transportation

Until later years, the regulation of interstate commerce has been largely a matter of dealing with railroads Much such commerce, however, always *has been water-borne—in vessels plying the coastal waters of the country or* its rivers and lakes Notwithstanding that the power of Congress to regulate this commerce was perfectly clear for a long time actual regulation (more strictly promotion) took the form almost exclusively of federal planning and *expenditure for the improvement* of rivers and harbors, and over the years billions of dollars have been spent for this purpose, sometimes legitimately and wisely, but often from motives having more to do with politics than with navigation—river and harbor bills always having been a favorite source of congressional "pork" Only in a transportation act of 1940 did Congress get around to regulating rates, services, and management for trade carried on by water (or partly by water and partly by rail), by methods broadly similar to those long applied to railroads Already aptly termed "the economic supreme court of the American transportation world," the Interstate Commerce Commission now found itself with a considerably widened jurisdiction[14]

3 Motor transportation

Meanwhile, however, that jurisdiction had been enormously extended also in another direction The automobile had been introduced, and trucks and buses had come into use For a good while, distances covered were usually limited and no regulation was deemed necessary beyond state or local provisions concerning licensing and safety As, however, truck and bus business developed on something approaching its present huge scale, serious difficulties and abuses arose—cut throat competition between companies and between

[14] All commerce on inland waters as well as all coastwise trade is, by act of Congress, restricted to American vessels—except in occasional instances where such waters are used by foreign shipping merely in transit between foreign ports

them and the railroads, under-payment of employees, laxity about accident insurance, dubious financing, and although remedial measures were instituted by some states it became apparent that the business had assumed such an interstate aspect that, as the Interstate Commerce Commission long urged, the problem was fundamentally one for the national government In 1935, therefore, Congress passed a Motor Carrier Act bringing all interstate truck and bus lines within the pale of federal law and making the I C C the regulating authority Just as by improving waterways, the federal government helped create for itself the problem of regulating water borne commerce, so by cooperating with the states in developing a nation wide system of arterial highways it helped bring upon itself the task of controlling motor transport

4 Aviation

Shortly after World War I (which imparted a considerable impetus to aviation) a standing interstate conference having as its object the promotion of uniformity in state legislation [15] brought forward a uniform state law for aeronautics, and numerous states adopted it As time went on, however much if not most, flying became interstate and in 1926 Congress passed an Air Commerce Act applying to all interstate aviation and giving a bureau of air commerce in the Department of Commerce power to fix standards of safety, to test and license aviators and to make rules governing air traffic This agency has since been superseded and (after a somewhat bewildering succession of changes) there have come to be—since a Civil Aeronautics Act was passed in 1938—two main interrelated federal agencies with functions in this field (1) a Civil Aeronautics Administration, in the Department of Commerce, and (2) an independent Civil Aeronautics Board—the former concerning itself principally with mapping, lighting, and marking interstate airways, providing regular and emergency landing fields stimulating and subsidizing airport construction, licensing planes and pilots, and enforcing safety regulations laid down by the Board, the latter, principally with the quasi legislative and quasi judicial functions of controlling rates for the interstate transportation of passengers, mail and goods, promulgating safety regulations, investigating aircraft accidents, suspending or revoking licenses, and generally controlling aeronautics policy In a domain in which strict uniformity of rules and practices is peculiarly desirable, the states have in most instances risen to the need by incorporating all federal made regulations into their own aviation codes

5 Pipe lines

For a good while, crude oil and various petroleum products have been transported from the great Southwestern oil fields to the North and East not only by rail and water but also by pipeline, and the recent war and postwar years have seen a great expansion of this form of interstate commerce By its nature, natural gas definitely requires this method of transportation, and one of the most extraordinary developments in the transportation field since 1945 has been the multiplication and extension of transmission lines linking gas producing areas from Kansas to Louisiana with principal cities and many

[15] See p 607 below

smaller ones throughout more than half of the country Under appropriate conditions, rates and services are federally regulated, with the Interstate Commerce Commission functioning in the case of petroleum and the Federal Power Commission in that of gas

## INTERSTATE COMMUNICATIONS

As illustrated by motor and air transport (and indeed, if one goes back far enough, by the steamship and the railroad), science and technology are responsible for many new modes of transportation, progressively expanding the scope of "commerce" and augmenting the task of regulation In the field of communications, they have added if possible even more—through the techniques of producing and distributing newspapers, the methods of handling the mails, and especially the harnessing of electrical energy In most European countries, facilities for electrical communication, *i e*, telegraph, telephone, and radio, are government owned and operated, directly or through auxiliary corporations Apart from some limited ownership and operation of facilities for its own use by the national government, all of these instrumentalities in the United States, on the other hand, have been developed and, speaking broadly, are owned and operated privately, and since all more important ones are necessarily interstate, and in some instances international, substantially all fall within the range of federal control over commerce

1 Telegraph telephone, and cable

Originally, intrastate wire communications were regulated, rather ineffectually, by the states, and interstate communications practically not at all And this continued to be the situation even after Congress, in 1910, gave the Interstate Commerce Commission jurisdiction over telegraph, telephone, and cable companies operating in interstate and foreign commerce, for, preoccupied with railway problems, the Commission paid but little attention to its new duties Partly on this account, and partly because of unsatisfactory experience with the first federal machinery set up for regulating radio, Congress in 1934 concentrated all responsibility for both wire and wireless communications in a new independent regulatory body, the present Federal Communications Commission, consisting of seven members appointed by the president and Senate for seven-year terms Withdrawal of its functions in this field from the I C C marked the only instance in over 60 years of its jurisdiction being narrowed—although, as implied above, its actual loss was small There still are numerous small, local, independent telephone companies over which state utility commissions retain control as to rates and services The American Telephone and Telegraph Company (actually confined to telephone service save for providing the wire circuits for Western Union), however, now covers the entire country with its facilities Since the merger of the Postal Telegraph Company with the Western Union Company in 1943, there are no telegraph competitors of any importance Thus most telephone and practically all telegraph services are under federal regulation, as of course, for obvious reasons, are all cable lines Submarine cables can be licensed only by the president,

who also is responsible for seeing that reasonable rates and services are maintained Even here however, the F C C has control over the actual transmission of messages and over telephone and telegraph services it has substantially the same powers as does the I C C over railroads The lines are 'common carriers their services must be adequate, their rates must be just and reasonable authorized by the Commission, publicly advertised, and changed only with notice given the Commission and public, no discriminations may be practiced, new lines may be constructed and existing ones extended only with the Commission s consent and full reports must be rendered, with access by the Commission to all records and accounts Quasi judicial decisions, which are numerous can be appealed to the courts

2 Radio Radio broadcasting had its actual beginning in 1920, and although seven years later Congress belatedly recognized a need for federal regulation, it assigned the function to a separate Federal Radio Commission of five members charged with licensing stations, assigning wave-lengths and exercising other supervision The arrangement did not work well, and, in 1934 the Commission was abolished and its functions vested in the new Communications Commission which thereupon shouldered tasks and duties hardly exceeded in complexity and difficulty by those of the I C C Unlike other activities and services reviewed, radio-broadcasting—on the theory that any waves may cross state boundaries—is under *exclusive* federal control, and subject to the ultimate authority of Congress, all power is in the Communications Commission The number of radio channels being limited by nature, the first and largest problem becomes that of choosing among great numbers of applicants for the privilege of operating a station those persons (citizens only) who shall be given licenses, and what frequencies they shall be assigned The criterion required by law is 'public interest, convenience, and necessity , but in many situations it is by no means easy to apply

Beyond this too, lie problems of regulation To be sure, broadcasting stations, although engaged in interstate and foreign commerce, are declared by law not to be 'common carriers,' which leaves the Commission without authority to regulate the rates which they charge the advertisers from whom they draw most of their revenue Other forms of regulation are lacking also On the other hand, the Commission is required to see that lotteries and other such enterprises are not advertised, that "obscene, indecent and profane" language is not put on the air, and that all candidates for a given public office are allowed equal access to time Expressly forbidden to exercise censorship, the commissioners none the less may indirectly do so, because (at lengthier intervals now than formerly, but commonly every two or three years) all broadcasting stations must come up for renewal of their licenses, and it is at least theoretically possible for them to have trouble if what they broadcast does not square with the commissioners' sense of propriety, besides, licenses may be revoked One's sympathy, however, really is due the commissioners, for, bombarded as they are with far more demands for licenses than can possibly be met, and criticized (whatever they do) by political, religious, and other interest groups, it is doubtful whether any other body of officials in the

government has so thankless a task [16] Yet their position is highly strategic, for radio policy has become central to basic problems like civil liberties social education propaganda public opinion and even defense [17]

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See p 440 below

# CHAPTER 26

## Government and Business

Earlier attitudes

For a good while after our national government was founded, the climate of economic opinion in which it operated was definitely Hamiltonian A strong government, it was considered, had been made possible by leadership of the business elements in framing and adopting the constitution, and from these elements would come its most dependable future support Government, in turn, should foster private enterprise by providing facilities, removing impediments, even granting an occasional subsidy And from such alliance of government and business—with prices of products kept within the reach of consumers by free competition among producers—would flow a prosperity spreading throughout the entire population In pursuance of these concepts, furthermore, the national government during the first decade under the constitution laid business under heavy obligation by putting the national credit on a secure basis, establishing a sound monetary system, chartering a United States Bank, and creating other favorable conditions notoriously lacking under the Articles of Confederation—later also providing roads, constructing canals, and laying protective tariffs That any government, national or state, should seek to bring business interests, operations, and practices under restraint (except in the interest of free flow of interstate commerce), would have seemed wholly undesirable The country s development, it was believed, would be best served by allowing full scope for competitive private enterprise

The different situation today

Even in the earliest days, however, there was some dissenting opinion Looking upon agriculture rather than business as the bulwark of national strength and well being, Jefferson and people of his way of thinking were not averse to seeing business placed under occasional restriction when the two interests clashed, and while the Hamiltonian notion of the right of business to go its own way never wholly died out, the next century and a half brought an entirely different general attitude Not only does the federal government nowadays encourage and promote business in many ways not conceived of in Hamilton's and Jefferson's time, but it has become deeply involved in business operations of its own In addition it has swept a mighty regulating arm over virtually the entire field of private or semi private commercial, industrial, and financial activity, fixing conditions of competition, forbidding practices held socially undesirable, and, under copious legislation associated initially

at many points with the New Deal, controlling production, prescribing minimum wages and maximum hours, requiring collective bargaining, prohibiting false advertising of commodities, and regulating sales of securities During World War II, a peak was reached when industrial establishments were, in effect, told what they might manufacture when access to necessary materials was scaled according to priorities, and when the prices at which products might be sold were placed under ceilings prescribed from Washington A new wave of special controls induced by the defense mobilization started in 1950 has not mounted quite so high But even complete relaxation of international tensions, if such can be imagined, would leave federal (with also a good deal of state) control of business at a level unknown in any earlier peacetime period of our history

A general view of government business relations

If one steps back for a general look at the entire field of government and business in this country, a more complicated picture confronts him than he at first might have expected To begin with, he sees intermingled throughout our economy four basic patterns (1) private ownership and private operation, illustrated by the railroads and most other utilities, most banking oil production, steel and textile manufacturing, and most life and fire insurance, (2) public ownership and public operation illustrated by the postal service and by a long list of government corporations like the Reconstruction Finance Corporation, the Inland Waterways Corporation, and the Tennessee Valley Authority, (3) private ownership and government operation, as seen in the Federal Reserve System, and (4) public ownership and private operation, illustrated by publicly built and owned munitions plants operated by private companies during World War II He finds, further, that while public ownership and operation has been on the increase sufficiently to cause some people to worry over a possible trend toward socialism, there is far more private and far less public economic enterprise than in any other major country In particular, he notes the contrast with not only (1) the totalitarian USSR with its collectivization of virtually all industry and business, but even with (2) democratic Great Britain, which under a socialist Labor government since 1945 has seen the coal, transportation, gas and electric, steel, and other industries "nationalized," and with (3) equally democratic Scandinavian countries with their mixed, "middle-way" economies in which the governments have a controlling interest in most major economic enterprises Finally, he observes the inevitable corollary of our penchant for private ownership and management, namely, our heavy reliance upon governmental regulation of privately owned and operated business organizations and procedures Broadly, public ownership and operation is the European way, private ownership and operation, with public regulation, the American way In a country like Great Britain, there is comparatively little regulation of private enterprise (outside of rules on sanitation and the like), here, business and industry are confronted with public regulation—of rates, services, finances, pensions, hours, business practices—at almost every turn

Three main aspects of the over all present situation require comment (1) the federal government's present direct participation in busin

of the ways in which it assists private business, and (3) some forms taken by its regulation of such business

## THE FEDERAL GOVERNMENT IN BUSINESS

Notwithstanding the predominance of private business in this country, governments on all levels handle property, buy supplies, sell products and services and sometimes carry on extensive regular businesses, as when states operate liquor stores and municipalities own and operate water works, electric light plants, gas works, street railway or bus lines, and other utilities From the earliest days when the postal service was taken over, the federal government itself has been in business, indeed, in 1949 the Hoover Commission found it owning or financially interested in, no fewer than 100 important *business enterprises, representing a direct federal investment of more than* $20 billion [1] Ours certainly is not a socialist economy, but neither is it a purely private enterprise economy Instead, it is mixed

**Constitutional authority**

Regardless of how far federal business activities are carried, little or no constitutional difficulty usually is encountered Broad financial powers, war powers the commerce power, the postal power, the welfare clause—all can be drawn upon, and added to these is the authority given Congress "to dispose of and make all needful rules and regulations respecting the *property* of the United States [2] 'Property' is a very comprehensive term, moreover, a government that can "dispose of' property manifestly can also acquire and use it

**Operations and agencies**

Any full enumeration of federal business interests and activities would surprise most readers No such listing is feasible here, but a few things may be mentioned

1 Through the General Services Administration created in 1949, the government purchases miscellaneous supplies in almost incredible quantities, and through the Commodity Credit Corporation in the Department of Agriculture equally amazing stocks of farm products in connection with the price support program to be touched upon later

2 It also sells—electric power, fertilizers, timber, farm products and after 1945 industrial plants and great quantities of supplies representing surpluses left over from war

3 It manufactures munitions ordnance, currency, fertilizers, and many other things constructs ships erects buildings, and in the Government Printing Office at Washington operates the largest printing establishment in the world

4 It owns and operates the Alaska Railroad, the Inland Waterways Corporation, and the Panama Canal

5 *On the list too are the largest hydroelectric enterprises in the country*—Boulder Canyon (Hoover Dam), the Columbia River Power System (Bonneville Dam, Grand Coulee Dam), and the Tennessee Valley Authority, besides many lesser ones

6 More than 30 different federal establishments are engaged in lending guaranteeing or insuring money, in fields as diverse as agriculture, banking, housing veterans' aid Indian affairs, public health and foreign assistance

[1] *Federal Business Enterprises* (Washington D C., 1949), 1
[2] Art IV, § 3 cl 2

7 The government operates a network of veterans' and other hospitals, and provides recreational facilities in national parks

8 In the postal service, it conducts what is claimed to be "the biggest single business in the world"

Some of these steadily multiplying undertakings are carried on directly by regular departments (like the Post Office), by branches thereof (like the Bureau of the Mint in the Treasury Department), or by independent establishments (like the Veterans Administration) But a great proportion are managed by government owned corporations, often competing with private business [3]

The postal service

1 Con stitu tional basis

One national enterprise which in the main is not thus competitive is the postal service,[4] about which a word may be added So intimate is the connection between the postal service and commerce that, had the constitution been *silent on postal matters, Congress easily might have established a postal* system under powers implied in the commerce clause One finds, however, in the list of powers expressly conferred that of establishing "post-offices and post-roads", [5] and the only serious constitutional issue ever arising was that of whether, as strict constructionists for a good while contended, this power extended only to designating which of existing routes should be used for transmission of the mails, or whether, as broad constructionists argued, it included the right to build and operate new roads for the purpose As usually has happened, the more liberal interpretation prevailed, and in later decades the improvement of the postal service has repeatedly been employed as a justification for federal aid to highway construction and, to development of airlines, even within individual states The postal power belongs exclusively to Congress, and the postal service created under it is, in the strictest sense, a government monopoly

Growth and fun tions

Any one desiring to convey some impression of the amazing progress of the United States in the past 160 years hardly could do so more effectively than in terms of the growth of the postal system He could cite the 41,464 post-offices and 32,619 rural delivery routes in operation in 1950, the latter serving over 31 million people, the receipts of $1 677 billion in the same year, compared with $280,000 in 1800, the more than 45 billion pieces of mail of all kinds handled annually, and the almost 500,000 regular and temporary employees, a force constituting *nearly one-fourth of the entire executive civil* service Even more striking, however, would be the panorama of expanding functions and activities which have made the Post Office the department whose operations come closest home to the great mass of the people High points in the exhibit would be the introduction of the registration system in 1855, the beginning of urban free delivery in 1863, the establishment of the money order

[illegible] took over temporarily the management of

money order and postal savings systems to some extent with the operation of banks

[5] Art I, § 8, cl 7

system in 1864, the starting of "special delivery" service in 1885, the launching of rural free delivery in 1896, the introduction of the postal savings system in 1911, the starting of the parcel post system in 1913, and the beginning of air mail service (operated largely under contracts with private aviation companies) in 1918. Some people might consider the picture somewhat blurred by the circumstance that the service has paid its way in only 13 years out of the last 100, with a deficit of half a billion dollars in each of the past three years.[5b] But that is something that almost no public services do, and while in the case of the postal system there are many contributing factors—among them, carrying and distributing 1.6 billion pieces of post-free government mail a year—the basic one is that, although conducted as a business, the people to whom the service ministers (including those of large rural areas where costs necessarily exceed returns) demand facilities which cannot be supplied on the simple dollars and cents, income-outgo, pattern of a chain store or a motor plant.[6]

## FEDERAL AIDS TO PRIVATE BUSINESS

From the beginning, the federal government was intended and expected to pursue policies favorable to business, and, like farmer and labor interests, business men never are backward about making their desires known in Washington. Moreover, business has been treated well—some would say too well. In serving the nation, the government undertakes little that does not actually or potentially, directly or indirectly, encourage, protect, or otherwise benefit business. Maintenance of law and order, provision for national defense, fostering of friendly intercourse abroad, protection of commerce, provision of a currency system, support of banking, operation of the postal system—all contribute to conditions obviously indispensable if the business interests of the country are to thrive. One of the nine executive departments, the Department of Commerce, has been aptly termed "the business man's representative in government", and through its bureaus or otherwise, many additional special services are rendered.[7] Of such services, two or three—especially the promotion of foreign and domestic trade and the provision of facilities for credit—have been touched upon elsewhere. A few others may be passed in rapid review.

[5b] Congress in 1951, however, substantially revised postal rates, particularly on post cards and second class mail, in order to reduce the anticipated deficit for 1952.

[6] Benjamin Franklin laid the foundations of our postal system when (British) deputy postmaster general for the colonies during the 20 years immediately preceding the Revolution, and also postmaster general in 1775-76. The Post Office Department administering the present service came into existence in a roundabout way. It was not recognized by statute as a coordinate executive department until 1874. But to all intents and purposes it enjoyed that status from 1825, when the term "post-office department" was first used in the title of an act of Congress, and even more definitely from 1829, when, on the initiative of President Jackson, the postmaster general became a member of the cabinet.

[7] On recommendation of President Theodore Roosevelt, a Department of Commerce and Labor was established in 1903. Seven years later, Labor was set off as a separate department, and since that time the Commerce Department has had a somewhat varied career. With at present the following principal divisions or bureaus included: (1) Foreign and Domestic Commerce, (2) Coast and Geodetic Survey, (3) Census, (4) Inland Waterways Corporation, (5) Patents, (6) Standards, (7) Civil Aeronautics, and (8) Weather Bureau.

Throughout the country's history, business has profited immensely from federal subsidies, and some branches of it still do so Most conspicuous among beneficiaries has been the railway industry, on which more than $1 25 billion, chiefly in public lands, has been bestowed But road and waterway construction interests have been subsidized, ship building and ship operating interests recover from the federal treasury the difference in costs between American and foreign building and operation, discriminating taxes and regulations give American shipping intentional advantages, contracts with air carriers for transporting mail have been frankly drawn to subsidize a young industry—with subsidies, however, separated from payments for service after 1951

1 Subsidies

The most important subsidy received by business throughout our history has been that arising from protective tariffs Every tariff act from 1789 to 1930 had as one of its purposes, and often the main one, to enable American products to compete on favorable terms with foreign products in our markets, and while the trade agreements program launched in 1934, together with other international arrangements into which we have entered, have resulted in much lowering of tariffs, most major and really competitive commodities, like iron, steel, and wool, have not been greatly affected

2 Tariff protection

During and since World War II, American business has been powerfully stimulated and aided (although with taxes increased) by the government's programs of relief and assistance abroad Lend lease during the war, the later Marshall Plan, and most recently the program for rearming Western Europe, have made heavy demands upon American industry, helping to keep it running at top speed and swelling its profits The situation is artificial, and an obvious corollary is that the United States eventually must buy more foreign made goods But for the time being, at least business in this country has gained heavily from the government's undertakings

3 Government programs abroad

Just as the federal government is the country's largest banker, so is it likewise its greatest research institution Almost every domain is covered—agriculture, commerce, finance, defense, education, health engineering—and major agencies like the Bureau of Standards and the Atomic Energy Commission are employed, even the Census Bureau's task is essentially one of field research Subjects of investigation also include business in nearly all of its phases, along with social and economic matters (financial, commercial, statistical) of concern to business, and a steady stream of publications from the Government Printing Office places the alert business man under heavy obligation

4 Research and publication

The authority given Congress to fix the standard of weights and measures" [8]—a matter obviously of much concern to business—is so unrestricted that it can be, and has been, exercised in respect to all manner of measurements—length, weight, volume, temperature, strength, quality, and others And to aid in determining such standards, the Bureau of Standards, one of the country's foremost scientific institutions, is maintained in the Department of Commerce Along with the familiar units taken over from old English usage—the pound, yard, gallon, bushel, etc (with their derivatives), the metric

5 Standard weights and measures

[8] Art I § 8 cl 5

system employed in Continental countries, and having considerable advantages, has been given official status, even though as yet but little actual use is made of it outside of scientific circles So far as developed to the present time, the function of the national government is merely to "fix" standards, keep models in the Bureau of Standards, and furnish models or copies to the states, leaving it almost entirely to state and local governments, in the interest of honesty and regularity, to require compliance with the appropriate standards in business and other transactions in so far as they choose to do so Congress might not only *fix* standards, but set up machinery for enforcing them nationally This, however, it has not done, with the result that in day-to day practice there is not entire uniformity the country over Much research and testing are carried on by the Bureau, with results placed at the disposal of industries, business establishments, and government agencies

6 Patents

To "promote the progress of science and the useful arts," Congress is authorized by the constitution to secure to authors and inventors, for limited periods, 'the exclusive right to their respective writings and discoveries",[9] and on the basis of this power, an elaborate system of copyrights and patents has been built up Copyrights, administered by the Library of Congress, are not without some relevance for business (especially publishing), but patents naturally have greater importance Through a Patent Office in the Department of Commerce, a patent, carrying a right to exclusive use of the device or process covered, may be granted to any person who has invented or discovered "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country and not patented or described in any printed publication in this or any foreign country and not in public use or on sale in this country for more than one year' prior to the filing of the application As suggested by this phraseology, patents, unlike copyrights, are not granted to every one who applies, on the contrary, the Patent Office is supposed to do its best to find out whether the machine, device, or process for which a patent is sought is actually new and whether a patent for it would infringe rights under some patent previously granted, and the period for which a patent runs is 17 years, with, in general, no right of renewal Appeals against decisions of the patent examiners in the Patent Office may be taken to a board of patent appeals in the Office, and thence to the Court of Customs and Patent Appeals or to a federal district court Moreover, while in general the monopolistic rights carried by a patent are not legally challengeable, the uses made of patents, especially by big industries, singly or in combination, sometimes bring the holders into conflict with the laws prohibiting contracts in restraint of trade, and also raise the question of whether anything can or should be done to overcome the economic and social effects of concentration of sometimes hundreds, and even thousands, of patents in the hands of a single big business enterprise Slightly over 100 years ago, a commissioner of patents soberly recommended to Congress that his office be abolished because "every-

[9] Art I § 8, cl 8

thing had been invented " How far wrong he was is indicated by the fact that from 25,000 to 50,000 patents are nowadays granted every year, the 2,492,-130th in the country's history being, in fact, recorded on December 20, 1949 [10] Of course, not all patents are important, in a case in 1950, in fact, the Supreme Court expressed impatience with mere gadget-makers for seeking patents and with the Patent Office for humoring them

7 Bankruptcy

Bankruptcy is one of a number of matters over which the national and state governments have concurrent jurisdiction, and for more than 100 years (except for three brief intervals) it was left entirely to state control In 1898, however, Congress passed a general bankruptcy act, and thereupon former state laws on the subject either were repealed or fell into a condition of suspended animation It still is permissible for a state to legislate on bankruptcy But in all instances of conflict the national law takes precedence, and this law is so comprehensive that little need or room for state action remains Proceedings in bankruptcy cases started either by the bankrupt himself or by his creditors, fall under the equity jurisdiction of the federal district court of the district in which the bankrupt resides, and after a bankrupt's assets have been inventoried and equitably distributed among his creditors, the judge enters a decree discharging him from all further legal liability for debts incurred prior to the commencement of proceedings

The extraordinary number of bankruptcies occurring during the depression of the early thirties led to much new legislation supplementary to existing bankruptcy law, and the resulting measures proved of substantial importance in speeding up business and agricultural recovery, especially by permitting prompt readjustment, on a business-like basis, of debts owed by railroads and other corporations At the same time the opprobrium of bankruptcy was entirely obviated in the case of any company whose affairs were sufficiently sound to be susceptible of reorganization Finally, in 1938, and 1946, Congress enacted general revisions of the bankruptcy laws calculated to coordinate and unify the expanded system

## FEDERAL REGULATION OF BUSINESS COMBINATIONS

Corporations, trusts and holding companies

Business in this country attained its present immense proportions mainly through the growth of corporations and the pyramiding of such corporations, *in turn, into combinations of still greater size and power* Public or "government," corporations naturally obtain their charters from Congress Private ones may do so likewise, but usually get them rather from a state (Delaware being a favorite because of the easy terms permitted), with legal rights ostensibly restricted to the state of incorporation, but in practice commonly acquired in other states as well by simple formalities of registration Their owners are the people who hold shares of stock, capital is obtained also from those who lend them money, receiving certificates of indebtedness in the form *of bonds, and the officers and directors* who operate them are largely im-

[10] In addition to granting patents the Patent Office registers trade marks and labels for use on goods distributed through channels of interstate and foreign commerce

mune from personal responsibility at law, with the organizations themselves liable in only limited degrees Sixty or seventy years ago, corporations began forming associations or alliances aimed at combinations based upon agreements fixing prices, dividing sales territory, limiting production, and sharing profits Presently there appeared also "trusts," in which stockholders of competing concerns turned over their rights 'in trust" to a single concern controlling all of the affiliates and dividing profits among them In time, too arose holding companies' with assets consisting solely of stocks of operating companies whose affairs they dominated, and multiplying especially in the field of gas electric, and other public utilities And on such a scale did these various developments proceed that in 1933 our 100 largest industrial units (corporations trusts holding companies, and other combinations), with assets aggregating almost $100 billion, controlled not only nearly half of the country's industrial wealth, but a fifth of the national wealth all told[11]

The problem of monopoly

From such concentration of economic power, evils long ago began to flow—over capitalization 'watered stocks and the like but chiefly monopoly, with its inevitable strangulation of smaller competitive enterprises, its concentrated domination of an economic function or group of functions, its independent and irresponsible control over services and prices Manifestly, in certain areas monopoly is hardly to be avoided, rarely is it practicable, and never economical, for two or three gas and electrical companies to operate in the same city And in such cases, in lieu of the regulatory influence of competition, monopolistic abuse has to be prevented by direct public regulation From England, however, America inherited a deep seated antipathy to monopoly in general, and the common law as brought across the Atlantic (and still basic to our legal system) made unlawful any monopolistic powers and practices unreasonably obstructing trade—in other words, interfering with the freedom of competing businesses, large and small, to organize and operate on equal terms And such free scope for individual initiative and enterprise, leaving the way open for failure and disaster, but also for opportunity and achievement, and insuring the consuming public the benefits of quality and price flowing from a competitive quest for markets and profits, has remained the most treasured feature of our American economic system By the same token, the protection of this national heritage—in other words, the prevention of monopolistic abuses—has been, increasingly in these later days of 'big business," a major public concern and a topmost task of government

State regulation proves inadequate

For upwards of 100 years—while the Supreme Court continued to regard Congress as having no power to regulate interstate commerce except as to matters involved *directly* in commerce—the states were left to deal alone with monopolistic and other practices interfering with the free flow of trade, and whatever correctives they employed rested either merely upon the old common law principle that all combinations operating to restrain trade *unreasonably* were illegal, or upon statutes defining or modifying that principle's applications In earlier and simpler days, no great amount of difficulty was

[11] National Resources Committee *The Structure of the American Economy* (Washington D C 1939) 105

experienced, business still was largely localized within states, and state regulation served most essential purposes. When, however, the era of big business dawned, and of business operating over wide interstate areas, something more became necessary.

Federal control introduced—the Sherman Act (1890)

In 1890, therefore, Congress responding to public (especially Populist) protest against monopoly prices, risked judicial disapproval by passing a notable measure—the Sherman Anti Trust Act—aimed at protecting trade and commerce "against unlawful restraints, and monopolies," and to that end declaring, in sweeping terms, every contract, combination, or conspiracy in restraint of trade or commerce among the several states or with foreign nations to be illegal, and providing heavy penalties for violations.[12] The law was amply stiff. Congress, however, made the mistake of leaving enforcement simply to the Department of Justice with no special machinery and hardly any funds provided. Busy with other things, that Department showed little zeal for action. A Supreme Court decision in the Sugar Trust case of 1895[13] severely narrowed the scope of the law by ruling that although the defendant produced all but two per cent of the sugar used in the United States, its business was primarily *manufacturing*, rather than *commerce* and therefore subject to regulation only by the states. And for another decade virtually nothing happened—with most of the really huge industrial "trusts" of later days meanwhile getting their start.

The "rule of reason"

"Trust busting" was one of President Theodore Roosevelt's prime interests, and successful prosecution in *1904 of a prominent holding company* charged with monopoly in the railway field[14] gave him fresh impetus. Notwithstanding government victories in other cases, however, the Supreme Court again weakened the law by setting up a distinction between combinations which, in the Court's opinion, involved only a "reasonable," and those which amounted to an "unreasonable," restraint of interstate or foreign trade. In cases in 1911 against the American Tobacco Company and the Standard Oil Company, for example, the Court applied this "rule of reason" and in effect read into the law declaring illegal "every" combination, etc., in restraint of trade, the word "unreasonable," after the word "every." The effect was virtually to overrule not only the probable intent of Congress, but earlier decisions in which the Court had held that *all* such combinations in restraint of trade came within the limits of the statute.

Further legislation required

Experience of this sort naturally suggested that if the law applied only to "unreasonable" combinations some means should be provided by which well intentioned combinations might know whether they would be regarded by the government as "reasonable," and therefore lawful, without first being subjected to a criminal prosecution to determine the matter. Demand arose, too, for clarification as to the kinds of arrangements that the government would look upon as unreasonable restraints of trade, and as to the corporate practices that it would regard as constituting unfair competitive methods. And as a

[12] 26 *U. S. Stat. at Large* 209.
[13] United States v. E. C. Knight Co., 156 U. S. 1 (1895).
[14] United States v. Northern Securities Co., 193 U. S. 197 (1904).

result (1) the Clayton Anti-Trust Act[15] was passed in 1914 to reenforce and supplement the Sherman Act, and (2) simultaneously the Federal Trade Commission was created as an agency to cooperate with the Department of Justice in enforcing "anti trust" laws, new and old, and especially to curb unfair competitive practices in the conduct of business

The Clayton Anti Trust Act (1914)

Earnestly sponsored by President Wilson as a "new law" to meet "conditions that menace our civilization" though opposed with equal vigor by business interests the Clayton Act (1) forbade price cutting to drive out competitors granting rebates making false assertions about competitors, limiting the freedom of purchasers to deal in the products of competing manufacturers and a long list of other abuses, discriminations, and restraints of trade, (2) forbade corporations to acquire stock in competing concerns, if the effect would be to lessen competition, and outlawed interlocking directorates in the case of larger banks, industrial corporations, and common carriers, (3) made officers of corporations personally liable for violations of the act, and (4) made it easier for injured parties in cases arising under either this act or the original anti trust law to prosecute their suits

A quarter century of irregular enforcement

The object of the new legislation of 1914 was to close the gaps in the Sherman Act, and President Wilson hailed it as supplying "clear and sufficient law to check and destroy the noxious growth [of monopoly] in its infancy" Notoriously, however, it proved less effective than had been hoped Congress failed to provide adequate funds for properly staffing the anti trust division of the Department of Justice, leaving it possible to prosecute only the most flagrant cases in a few large industries In interpreting "unfair methods of competition," the courts grew increasingly tolerant To a dead weight of opposition from large business interests was added honest doubt of disinterested students, including some federal officials, as to whether the entire program was practicable, or even desirable, and especially as to whether corrective regulation of trusts and other combinations was not preferable to attempts to break them up completely Efforts, too, to make directors personally liable for the acts of corporations almost completely broke down During World War I, the entire program was, to all intents and purposes, suspended, through ensuing Republican administrations, the legislation was seldom invoked, and when the National Recovery Act of 1933 was placed on the statute book in an effort to rescue the country from a great depression which the anti trust laws manifestly had not availed to prevent, those laws were expressly waived for as long as the emergency legislation should remain in force

This second period of suspension proved of only two years' duration, and thereupon the laws came back into at least nominal operation Presently, too, they acquired some actual vigor In 1938, a former professor of law at Yale University, Thurman W Arnold, was placed in charge of the anti trust division of the Department of Justice and forthwith became the most assiduous "trust-buster" that the country had known since Theodore Roosevelt instituting in five years 44 per cent of all proceedings started under the anti-

[15] 38 *U S Stat at Large* 730

trust laws between 1890 and his retirement in 1943 There was, however, some shift from the old idea of "trust busting" as an object in itself to that of simply defending a free market in the necessities of modern life, and with this broader social end in view, prosecutions were directed primarily against private groups that had established themselves in strategic positions of control —against "bottle-necks of business" that blocked the distribution of products anywhere along the line from the raw-material stage to purchase by the ultimate consumer In 1938, also, on President Roosevelt's initiative, Congress provided for a Temporary National Economic Committee charged with looking deeply into the entire problem of concentration of wealth and economic control, and the effects of it on American life

**The situation during World War II**

While, however, the new enforcement campaign was in progress, the country was plunged into World War II The Committee had reported voluminously in 1941, piling up evidence of a tremendous concentration of wealth and economic power and deploring its consequences, but offering only divided recommendations for remedial action—even if the times had been favorable for any action at all And once more in wartime, proceedings under existing laws had to be slowed down President Roosevelt announcing in 1942 that, while every effort would be made to protect the public interest, with no violation of law escaping ultimate punishment, prosecutions would be postponed whenever it could be shown that they would tend to interfere with production of materials for war use In the same year, indeed, Congress expressly exempted from prosecution at any time any acts or omissions "deemed in the public interest and approved by the chairman of the War Production Board after consultation with the attorney general

**Postwar developments**

The war ended with suits pending and others postponed, and enforcement activities (never entirely suspended) were stepped up President Roosevelt's lively interest was no longer in the picture But his successor showed concern and indeed during the campaign of 1948 made much political capital of attacks on "big business, special interests, trusts, and Wall Street After the election, moreover, Administration forces launched a two-fold program, on the one hand a vigorous drive for anti trust law enforcement, and on the other a more cooperative approach aimed at clarifying for business the many ambiguities of existing law and drawing sharper lines between what the government considers legal and what illegal combinations and practices One cannot see that as yet the policy of clarification has yielded much result, but at any rate anti trust actions, sustained by increased congressional appropriations, have been proceeding at a fairly lively pace, with the government's targets including some of the country's largest industrial enterprises [16]

**A continuing dilemma**

Over a 60 year stretch, frontal attack on monopoly, through the Department of Justice, has yielded mixed and not highly impressive results A limited number of large concerns, *e g* the Standard Oil Company and the American Tobacco Company as earlier constituted, have been broken up, others have

[16] For example the 'Big Four meat packers, Dupont, General Motors United States Rubber A T and T General Electric "A and P the principal motion picture producers and farm machinery manufacturers and several large oil companies

been brought to book and penalized, many minor punishments have been inflicted along the way. Large obstacles, however, remain, and by their nature never can be wholly overcome. Among them is the dependence of the laws for vigorous enforcement upon the economic predispositions and personal inclinations of successive presidents, attorneys general, and other high officials, and these factors in the picture may change sharply with any national election. A second impediment is recurring uncertainties, despite all the legislation and court decisions, as to what, in many situations, actually constitutes "unfair competition," "unreasonable" restraint of trade, "conspiracy," "natural growth" of an industry, and the like. A third is the sometimes wavering support given by the courts. And possibly the weightiest of all is divided opinion, with resulting hesitation, springing from the inexorable circumstance that large scale production and merchandising requiring large scale organization makes for economies, and therefore often for more and cheaper goods and services for the consuming public. In the face of these and other impediments, effort to insure equity and opportunity for 4 million business concerns of *all* sorts, small as well as large, and also just treatment for those who patronize business, must of course be kept up, yet can, at best, be expected to attain its goals, as in the past, only somewhat imperfectly.

## THE FEDERAL TRADE COMMISSION AND THE POLICING OF BUSINESS PRACTICES

Functions and activities

Concerned chiefly with business combinations and contractual arrangements, the Sherman Act relies for enforcement almost entirely upon the anti-trust division of the Department of Justice, no commission or other special enforcing agency ever has been introduced. To bear main responsibility for enforcing the Clayton and Federal Trade Commission Acts, directed at dishonest and unfair, as well as monopolistic, business practices, the legislation of 1914, however, provided a new independent establishment in the form of the administrative and quasi judicial Federal Trade Commission, consisting of five members appointed by the president and Senate for seven year terms.[17] And in pursuance of its arduous task, this agency now is found (1) enforcing the laws (and its *interpretations* of the laws) against unfair competitive practices on the part of corporate and other businesses participating in interstate commerce (except banks, common carriers, broadcasting companies, and other enterprises regulated through different channels), (2) working out lengthy lists of unfair practices and holding conferences in which representatives of industry are encouraged to agree to avoid such practices (although the line between lawful and unlawful agreements is not always easy to fix),

(3) issuing "cease and desist" orders when violations of law are discovered and the violators are not disposed to desist of their own accord, (4) requiring corporations to submit reports covering aspects of their business on which the Commission desires information, (5) advising with corporations on organizational and other matters with a view to helping them avoid running afoul of the law, (6) guarding against unlawful acquisitions of stock by corporations and against prohibited interlocking directorates, (7) investigating trade conditions and practices in and with foreign countries where combinations or practices may affect the foreign commerce of the United States and (8) recommending to Congress new legislation calculated to uphold the principle of fair competition in the interest of both business itself and the public

Procedures

In enforcing the laws against unfair and fraudulent practices, the Commission may act in response to a complaint received, or by direction of the president or of Congress, or at the suggestion or request of the attorney general As a rule, however action starts with a complaint lodged by some individual, group, firm, or corporation having a grievance against a specified business concern because of some practice which it is alleged to be pursuing, and hundreds of such complaints are filed every year If, upon preliminary investigation, the Commission finds a complaint groundless or trivial, or relating to something over which the agency has no jurisdiction, or incapable of being regarded as affecting the public interest (mere private controversies have no status under the law), nothing happens If, however, the protest is believed to have merit, the offender is called upon to explain—often with the result that all parties consent amicably to a "stipulation," or agreement, that the practice complained of shall be abandoned If, finally, the concern under attack is not prepared to yield so readily, and if after hearings the Commission finds it in the wrong a "cease and desist" order will command the offender to discontinue the practice or practices in question within 60 days, and if there is failure to comply, the Commission may ask the appropriate federal court of appeals to affirm its order, which, if done, subjects the offender, in case of continued disobedience, to action for contempt of court

Difficulties encountered

In addition to obstacles arising from the inherent difficulty of construing such terms as 'unfair practice,' and from gaps and obscurities in the laws, the Commission has encountered many impediments It has not always had adequate financial support from Congress, its members have been shifted rapidly, and often have been selected primarily on political grounds, although supposed to be final judge of the facts in a case, it frequently has found the courts insisting upon making their own inquiries, and many times has seen its cease and desist orders overthrown, and it suffers from making foes of interests adversely affected by its decisions while winning only inarticulate support of an uninformed and unorganized consuming public All in all, however, while it has played an insignificant part in directly curbing monopoly, by preventing misleading advertising, deception, fraud, and misrepresentation, and by otherwise policing the business world, the Commission has done much to raise the standards of American business, and not only smaller

business but the consuming public has profited from the various forms of protection which it affords

## SOME SPECIAL FIELDS OF BUSINESS REGULATION

1 Securities and exchanges

Millions of Americans own shares of stock in medium sized or larger businesses, many others hope to do so, millions also have, in effect, lent money to such businesses by purchasing and holding their bonds or debentures Only in this way could our gigantic industrial machine be financed, only in this way, too, could large numbers of thrifty people find profitable outlets for the bulk of their savings Such distribution of stocks, bonds, and other securities, however,—chiefly through brokers and investment banking houses—opens a very wide field for fraudulent practices The average investor is in no position to know the actual financial condition, the prospects, or even the reliability and integrity, of many of the businesses to which he is solicited to intrust his money, and if he is at all gullible, he stands large chance of being "taken in" by the high powered salesmanship of dishonest, or at least unscrupulous, promoters and agents The common law, it is true, can be invoked against persons perpetrating fraud But against slippery vendors of securities, it is not likely to prove of much avail The national government, too, stands ready to prosecute persons using the mails for fraudulent purposes But most sales of securities are not made by mail And so notorious did abuses formerly become, with people swindled out of millions every year, that Rhode Island and Kansas, in 1910-11, led off in a belated effort of the states to make life uncomfortable for sellers of "the bright blue sky above" by placing all traffic in stocks and bonds within the state under public regulation Other states followed suit, with the result that by 1933 every one of the 48 except Nevada had "blue sky" laws of the kind

(a) State regulations

Here, again, however, state regulation, although beneficial, could not fully meet the need Machinery was inadequate for the complicated investigations required, more serious, promoters and salesmen freely operated across state lines in a business that by nature was to a large extent interstate When the depression developed in the thirties, it was considered that a main contributing cause had been the unloading upon an eager but uninformed public of worthless or dubious securities through misrepresentation and other fraud—"a traffic," as President Roosevelt characterized it "in the social and economic welfare of our people," and the experience brought home forcibly the need for stricter and more uniform regulation by national authority. The outcome was the enactment by Congress of two carefully drawn statutes—in 1933, a Securities Act focused on the issuance of new securities, and in 1934, a Securities Exchange Act, applying to the buying and selling of securities generally [18]

(b) Federal regulation introduced

(c) The Securities Act of 1933

The primary purpose of these two interlocked pieces of legislation, bringing almost the last important segment of the national economy under federal regulation, is to protect investors against every sort of fraudulent practice in

[18] 48 *U S Stat at Large* 74 and 881

issuing and handling securities offered for sale in interstate commerce To this end, the act of 1933 begins by requiring all issues of stocks, bonds, or other securities (with, however, certain exceptions), if to be offered in interstate commerce or by mail, to be registered with originally the Federal Trade Commission but since 1934 with a five man Securities and Exchange Commission set up in that year Every such registration must be accompanied by a "registration statement' containing full financial and other information, and also by the "prospectus" intended to be used in soliciting purchases by the public, and selling or offering to sell to the public in interstate commerce or through the mails any security not properly registered with the Commission is made a penal offense Not only so, but heavy civil liability is laid upon any corporation, including its directors and principal financial officers, for any untrue or only partly true declaration of a material fact in a registration statement or prospectus To the ancient rule, therefore, of *caveat emptor*—'let the buyer beware"—is added the complementary injunction, *caveat vendor*, 'let the seller beware It is not the business of the Commission, any more than of a state securities commissioner, to pass upon the inherent value of securities issued or upon the outlook for prosperity of the corporation issuing them, and no action by the Commission is to be construed as a recommendation of any security to potential purchasers The agency s only function, up to this point, is to see that complete information concerning a security is made available to the public, that this information is accurate, and *that no fraud is practiced in connection with sales*

(d) The Securities Exchange Act of 1934

To aid in promoting this general end, the Securities and Exchange Act of 1934 went an important step farther A large proportion—doubtless the major part—of the securities registered with the Commission are bought and sold on stock exchanges found in 20 or more of our principal cities, the largest and best known being that in New York Formerly, however, transactions in securities in these markets were subject to little regulation beyond the few restrictions which the exchanges themselves saw fit to impose upon their members, and these provided little protection for the investing public All manner of unsavory and dishonest practices grew up—'wash sales," matched orders, "rigging the market,' "jiggles," pools, and other manipulations —by which prices were pushed up or forced down for the benefit of insiders, while innocent investors were led like lambs to the slaughter Speculation "on margin," too,—*i e*, paying only a certain percentage in cash for what is bought and borrowing the remainder from the seller—reached scandalous proportions, notably in the frenzied market operations shortly preceding the crash of 1929, and threatened to precipitate the entire national credit structure into chaos

To remedy this situation, the transactions of all exchanges engaged in interstate commerce (as every one is) are declared by the act of 1934 to be "affected with the national public interest" which makes it necessary to provide for their regulation and control "in order to protect interstate commerce, the national credit, the federal taxing power, to make more effective the national banking system and the federal reserve system, and to insure the mainte...

of fair and honest markets in such transactions " Annual and other reports are required to be filed with the exchanges and the Commission by all corporations or companies having securities listed, and any deviations from material fact constitute grounds for suspending or withdrawing a given security from trading Various provisions outlaw objectionable practices of the past, and, all in all, the measure seeks to make the exchanges fair and open market places for investors rather than mere rendezvous for conspiring speculators One will not be so naive as to suppose that all stock market operations have since been, or ever will be beyond reproach Exceedingly timely and useful safeguards have however been supplied

(e) Regulation of sales of commodities

Based also upon the commerce power is a Commodity Exchange Act of 1936 seeking to prevent and remove obstructions upon interstate commerce arising from market manipulation and excessive speculation on exchanges dealing in agricultural commodities After various administrative shifts, a Commodity Exchange Authority in the Department of Agriculture is now in charge of enforcement, with wide discretionary authority over 18 exchanges trading in wheat, oats barley, rice, corn, soybeans, or other grains, cotton potatoes, butter, eggs, fats, oils or other commodities, and the agency is empowered to impose limits upon 'futures" trading [19] and upon speculative trading done by any one person on exchanges to curb excessive speculation and market manipulation and, in general, to fix trading rules and fair trade practices

2 Public utility holding companies

Consideration later of the conservation and use of water resources will necessarily bring up the subject of federal regulation of electric and gas utilities, and only one aspect of the matter need receive attention here Twenty or more years ago a troublesome problem was presented by the public utility "holding company —a corporation chartered in some particular state, holding the majority stock in operating companies scattered over the country, itself perhaps a unit under a holding company of still larger dimensions, and in any case able, because of its complicated interstate character, largely to evade regulation Some of the abuses, indeed, which the Securities Act and the Securities Exchange Act were designed to remedy attained their maximum seriousness in connection with the marketing and distribution of the securities of such companies

To correct the situation, Congress, when passing a general Public Utility Act in 1935,[20] made the first part, or "title," a Public Utility Holding Company Act giving the Security and Exchange Commission jurisdiction over all holding companies concerned with the production of electricity or gas and either participating in interstate commerce or making use of the United States mails—which of course meant substantially all Regulation of rates and services of such companies was vested by the law's second title in a Federal Power Commission already in existence Aside from rates and services, however, practically all aspects of gas and electric holding com-

[19] *I.e.*, contracts by which one party agrees to buy and another to sell a given quantity of a specified commodity at a fixed future date
[20] 49 *U S Stat at Large*, 803

*panies fall under Securities and Exchange Commission regulation* Every such company (unless holding less than 10 per cent of the stock of any subsidiary) must register with the Commission file full information concern ing itself and its subsidiaries and receive Commission approval without which it has not even any right to exist The issuance and sale of all such companies securities and all proposals for mergers and sales likewise must have Com mission endorsement Loans of operating companies to holding companies are forbidden likewise sales or services of holding companies to operating com panies, and excessive dividends may not be paid All accounts must be supervised by the S E C and full financial reports made to it and corporate members of holding companies may make no political contributions and if engaging in lobbying must report on all such activities

If President Roosevelt could have had his way all holding companies in the utility field if not also in others would have been doomed to extinction Conviction however that a holding company may be both legitimate and socially useful reenforced by large scale lobbying by the interests concerned influenced Congress to reject the drastic death sentence clauses of the original bill and to go *no farther than to specify that—with a view to un* scrambling highly complicated and baffling holding company structures—after the beginning of 1938 the interests and activities of a utility holding company should be confined to a single integrated system easier to watch and control In pursuance of this provision and under the vigilant eye of the S E C a number of large holding companies such as Associated Gas and Electric and Electric Bond and Share have in recent years been divesting themselves of operating companies and connections held not to be appropriate elements in an integrated system Holding companies are not banned but they must satisfy the S E C that their structure and operations are within the law

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## CHAPTER 27

# Assistance to Agriculture

### AGRICULTURE IN THE NATIONAL ECONOMY

1 Fewer farmers

The United States started as an almost purely agricultural country, and long remained such Ninety-five per cent of its population was rural in 1790, and as late as 1860 the proportion still was above 80 per cent Growth of industry and trade in later decades, however, greatly changed the picture, by 1920, the rural urban balance had been tipped in favor of the urban, and since then the urban has risen to 63 7 per cent and the rural fallen to 36 3 However, in 1950, only 15 6 per cent of the population resided on farms, the balance of the rural population lived in small towns and villages Upon this sharply diminished, and still declining proportion of our people, however, rests the major responsibility for feeding the country (in periods like recent postwar years, no small part of a hungry world also) and supplying its fibers and other raw materials, and this it does from a total of some 5 4 million farms, of which hardly more than half produce anything over and above what is consumed by the families operating them

2 Increased production

Even so, over production, with resulting low prices, has been a source of much difficulty in the past notably before and during the depression of the thirties, and while government can, and does apply correctives, they are expensive, wasteful, and not always wholly effective The explanation of the high productive capacity developed lies to some extent in improved crops and breeds (for example, hybrid corn) but mainly in the transformation of farming in later years by mechanization enabling fewer workers to produce more with less effort Between 1940 and 1944, food output, aided by good weather, was pushed upwards by 35 per cent, with farm laborers in wartime nevertheless diminished by two and one-half or three million and, altogether, hardly more able bodied men engaged in farming than in 1875

3 Larger farms

With hand labor fast giving way to power driven machinery, the size of farms has been increasing and their number decreasing [1] In 1945, more than half of all farm land was in holdings of over 500 acres, 40 per cent in holdings of at least 1,000 acres, and steadily increasing amounts are passing into the hands of absentee and institutional owners—canneries and other process-

[1] The average size farm was 174 acres in 1940 and 210 5 acres in 1950

ing establishments, banks, insurance companies, and the like On the other hand, much present power-driven machinery is capable of being used economically on moderate acreages, and one may comfortably assume that at least for a good while to come, the medium sized family farm, although threatened, will continue to be the backbone of the country's agriculture if not indeed, as Thomas Jefferson so ardently believed, of its democratic institutions and general well being

4 Some further drawbacks

Absorption of small farms into larger ones is, however, not the agricultural situation s only disturbing feature In 1940, two-fifths of all farms were operated, not by owners, but by tenants—' share croppers" in the South and also large numbers of renters in even such favored areas as the Middle West More than one fifth of all acreage now tilled is so eroded that it ought to be withdrawn from cultivation There are hazards of weather, of pests and diseases, of competition from foreign products, of marketing costs, of heavy taxes, and what not The proportion of agricultural income to total national income is surprisingly low—in 1947, only 9 5 per cent Periods of prosperity too, such as prevailed during and after World War II, seem inevitably to be followed by periods of over production and depression, and, despite prolonged and prodigious efforts of the federal government to bring the industry to a stabilized parity with the other great economic interests of our people, it still is not satisfactorily meshed with the general national economy

## GOVERNMENT AND AGRICULTURE

State and local activities

Although by nature and tradition the most highly individualistic form of enterprise in which our people have engaged, agriculture, like both industry and labor, long ago turned to the halls of government for encouragement and assistance Nor has the quest been in vain From early days, local governments contributed by providing roads enforcing fencing regulations, exterminating pests, supporting fairs and exhibitions, maintaining schools, and in other ways promoting rural welfare, and nowadays county boards have agricultural functions, and the interests of the farmer are in numerous ways served by an official known as the county agent (with also often a female home demonstration agent for a counterpart), sometimes selected at the state agricultural college on nomination by the county board and in any event—although responsible to both state and federal authorities—acting as a principal promoter of agricultural improvement within his county A hundred years ago and more, state legislatures, too, were passing laws and making appropriations for the farmer's benefit, and this they continue to do not usually by virtue of express constitutional authorizations, but in pursuance of reserved powers liberally construed by the courts Every state also has an agricultural college engaged in instructional and advisory work both on the campus and in the field, and likewise a department or board of agriculture endowed with inspecting, licensing, certifying, and other administrative authority, as well as with general advisory and educational functions

The nature of agriculture and its problems is, however, such that neither local nor state action can fully meet the farmer's needs Fundamental among these needs is, of course, that of being able to market grain, tobacco, cotton, livestock, and other products at prices yielding a fair return on property employed and labor expended Yet prices are determined by conditions and influences quite beyond the control of any single state Products must be transported, too, through channels of commerce cutting across state, and even national, lines And although the national government itself often finds farm problems baffling manifestly it can reach farther, and with more effect, than can any state The federal constitution, it is true, makes no mention of agriculture But no more does it speak directly of industry or labor And Congress has many powers *e g*, raising and appropriating money and regulating interstate and foreign commerce, from which broad federal authority for assisting and controlling agriculture can be, and has been deduced

Responsibility of the federal government

Beginning with proposals heard as early as Washington's first administration, and gaining momentum as agricultural interests and problems took on more of a national, and eventually international, aspect, the conviction grew that primary responsibility for ministering to the needs of agriculture and regulating it for its own and the nation s good rests with the federal government, and a systematic account of the activities flowing from this conclusion in the past three-quarters of a century—particularly since 1929—would make a lengthy and complicated recital Nor could the long story be brought to any end, for in the face of constantly changing agricultural conditions and needs, the federal government s task steadily grows more intricate and exacting, with problems of adjustment of production to consumption of price control, of stabilization of farm income, of land use, of soil erosion, of farm tenancy, of resettlement of handicapped rural populations, of rural electrification, and the like, still only partially solved A decade ago, during a wartime period of exceptional farm prosperity, some of these matters seemed less pressing Within a few years after hostilities ended however, basic farm legislation again was actively challenging labor-management relations, social security, civil rights, and national defense for congressional attention [1a]

science and government

## ENCOURAGEMENT OF PRODUCTION

As a factor in our complex national economy, agriculture has developed in such a manner that most farmers find themselves confronted with three major and interrelated sets of problems, pertaining respectively to (1) production, (2) marketing, and (3) credit On the production side, there is the anomaly that while government long has sought to encourage and stimulate—and in a number of ways still does so—it also (especially in the past 20 years) has sought to control and restrain Sometimes its policies of encouragement have been aimed not so much at greater agricultural output for its own sake as at bettering the lot of the farmer, but until of late the two commonly have been supposed to go together

Some methods employed

Policies pointed in this general direction over the years include (1) in earlier days, making arable land available by distributing large tracts of the national domain, later, irrigating semi arid areas, and still more recently, encouraging farmers to move from exhausted or otherwise substandard land to places of greater productiveness, (2) imposing tariffs on farm products from abroad, with a view to larger outlets for American products and at better prices—a policy, however, never too effective for the reason that in the case of most staple crops, such as cotton and grain, the American farmer himself normally produces an exportable surplus, (3) scientific research aimed at introducing new crops, improving varieties and breeds, increasing soil productiveness, combating pests and diseases, and applying sound principles of economics to all stages and forms of the agricultural process, and (4) disseminating the results of research and otherwise promoting popular education on agricultural subjects A word may be added about each of the last two policies enumerated

1 Scientific research

The medium through which research of direct significance to agriculture is carried on is mainly a series of bureaus and services in the Department of Agriculture The earliest function of the Department was, indeed, scientific investigation and dissemination of the information gained, and notwithstanding later multiplication of activities in other directions, the Department still is by all odds the greatest research establishment of its kind in the world Of bureaus devoted particularly to investigation (and coordinated under an Agricultural Research Administration), six of principal importance have to do with (1) agricultural and industrial chemistry, (2) animal industry, (3) dairy industry, (4) entomology and plant quarantine, (5) plant industry, soils, and agricultural engineering, and (6) human nutrition and home economics, differently placed in the Department is also a bureau of agricultural economics From the foregoing names, one can easily infer the general nature of the inquiries and experiments conducted by the various agencies, even though only an expert can completely understand and appreciate the technical procedures and objectives frequently involved Agricultural research, however, is carried on not only by federal agencies, but also by state and territorial experiment stations, and federal assistance to these is provided from funds

pledged by various acts of Congress and administered by an Office of Experiment Stations in the Agricultural Research Administration, which, in a supervisory capacity, lends unity and consistency to the programs undertaken

2 Agricultural education

The object of the investigative activities of all of the agencies enumerated is practical assistance to farmers, and this necessitates facilities for popularizing the results obtained Much information, of course, is conveyed directly through the medium of widely distributed bulletins, reports, and other printed documents *In these days of radio broadcasting, a good deal—notably such* matters of immediate concern as market reports and weather predictions—is put on the air But the federal government (in common with the state governments) also has committed itself to an ever widening program of agricultural education in the stricter sense of the term The country is now dotted with federally aided state agricultural colleges (organized for the most part under provisions of the Morrill Act of 1862), and along with the also federally aided experiment stations mentioned providing information relating especially to the climate, soil and markets of the region adjacent to each station Various forms of federally aided extension work are carried on also, with a view to bringing information directly to the farmer and his wife in their home Indeed, every one of the agricultural colleges now maintains a distinct division for the conduct of such work in both agriculture and home *economics Federal supervision is supplied by an Extension Service existing* since 1924 in the Department of Agriculture

## THE NEW DEAL AND THE PROBLEM OF OVER-PRODUCTION

A decade of unavailing measures

Having shown the farmer how to make two blades of grass grow where one grew before and how to raise livestock more efficiently, the government found that it had created for itself a new and even greater problem More farmers now had produce to sell more were dependent on receipts from 'cash crops', and when after an over extension of production incident to World War I, surpluses began piling up and prices falling the federal government was called on urgently for aid especially in developing markets, sustaining prices, and curbing market manipulations Down to 1929, assistance took chiefly the indirect forms of (1) furnishing full, exact, and up to the minute information concerning crop and marketing conditions and prospects, both at home and abroad (2) establishing and maintaining uniform grades and standards for commodities handled through the channels of interstate and foreign commerce, (3) regulating bonded warehouses and stockyards, licensing commission merchants, brokers and others who handled or dealt in perishable farm products, and in other ways protecting the producer against discrimination and fraud, and (4) protecting him against the market operations of speculators All mere marketing safeguards of these sorts, however, failed to yield farmers as a class a proportionate share of the prosperity which the country considered itself to be enjoying in the lush period 1921-29, and a makeshift Agricultural Marketing Act of 1929, designed to promote and

finance cooperative marketing and to stabilize prices through government purchase and storage of surpluses brought no better results—principally because there was no power to do the thing which the situation most obviously required, i e check over production

The first Agricultural Adjustment Act (1933)

With farm income falling by 70 per cent in three years, the problem of outlets and prices therefore was no new one when the Roosevelt Administration took it over (1933) in a period of dire distress in industry, trade, and agriculture alike and when, under urging from the President, Congress boldly bracketed with the National Recovery Act (aimed at revival of trade and industry) an Agricultural Adjustment Act, which in its novel production control features, launched a social experiment sometimes characterized as the most radical ever undertaken by government in the United States

1 The farmer s purchasing power was to be raised to a level designated by the later much used term parity

2 Parity was defined as a price level at which farm products would have the same purchasing power as in the arbitrarily selected but economically well balanced base period 1909 14

3 For attaining this level farmers were to be persuaded (not compelled) to reduce production

4 Resulting losses of income incurred by cooperating farmers were to be compensated by federal cash payments

5 Funds for the purpose were to come, not from general taxation, but from
nd other processors
lation applied [2]—it
ong in the form of
higher prices to consumers

To administer the law, an Agricultural Adjustment Administration was set up, and to it was given unprecedented authority to decrease the market supply of the commodities covered through voluntary agreements by farmers to reduce acreage planted to plow under a percentage of crops already growing to kill surplus sows and pigs, and otherwise to curtail production, and at the end of a year, the administrator was able to report that three million farmers, considering that they at least had nothing to lose, had signed production control contracts withdrawing from production a total of some 40 million acres of grain, cotton tobacco, and dairy land, that the farmers' cash income, including benefit payments, had risen by 39 per cent, and that the buying power of farm commodities had improved by 20 per cent

The A.A A declared unconstitutional (1936)

Almost from the day of enactment, however, the measure's constitutionality was questioned, attacks centering chiefly upon the processing taxes—"the heart of the law" Hundreds of cases appeared in the federal courts challenging the right of the government thus to employ the taxing power as a means of bringing about national regulation of agricultural production, and in a six to-three decision rendered early in 1936,[3] the Supreme Court pronounced the

[2] Originally seven i e wheat cotton field corn rice tobacco hogs and milk and its products. Later additions were beef dairy cattle peanuts barley flax grain sorghums sugar beets sugar cane and potatoes

[3] United States v Butler 297 U S 1 (often referred to as the Hoosac Mills case)

taxes unconstitutional, asserting that they were not taxes in the true sense (that is, levies for the support of the government), but rather exactions from one group to provide benefits for another—a device, too, by which Congress had presumed to invade a field (regulation of agriculture) reserved to the states under the Tenth Amendment

The quest for a substitute plan

Although the plan described had cost taxpayers and consumers nearly twice as much as the processing taxes had brought in it had contributed heavily to increasing farm income, and invalidation of the taxes was a blow to farmers, who no longer could hope to receive the benefits, or bounties which the taxes had in part provided Manifestly unless some substitute were devised, crop surpluses soon would reappear, farm income would drop, and the farmer would be back where he started Manifestly, too, a substitute could not be based on such use of the taxing power as in 1933 The situation was urgent, and with little delay, a new starting point was found in an unexpected quarter, *i e* in the right of Congress to promote the general welfare by protecting the country's natural resources Indeed, in a Soil Conservation Act passed in 1935, following widespread devastation and distress caused by floods and sandstorms Congress had unwittingly provided a foundation upon which a new farm aid and crop control program could be projected

The Soil Conservation and Domestic Allotment Act (1936)

Believing that an indirect production control plan, if tied in with this soil conservation measure, would meet the test of constitutionality, Congress, early, in 1936, passed a Soil Conservation and Domestic Allotment Act[4] erecting a new edifice of farm relief, with the objective the same, *i e*, restoring the pre-World War I purchasing power of the farmer, but with the approach different in that production control was to be merely *incidental* to soil conservation Instead of bounties for curtailed output, benefit payments (this time from general taxes) were to be made to farmers voluntarily cooperating with the government in the work of soil protection especially by shifting land from soil depleting crops such as corn, cotton tobacco, and wheat to soil-conserving or soil building crops such as alfalfa and clover with soil building payments due also for planting specified acreages of legumes or turning cultivated land into pasturage In protecting the productiveness of their soil, farmers, it was hoped, would so reduce their output of staple crops that surpluses would disappear

The second Agricultural Adjustment Act (1938)

Perhaps this expectation was too optimistic at all events, 1937 and 1938 proved exceptionally good crop years and the old vicious spiral of commodity surpluses and sharply declining prices set in again Accordingly, in the latter year Congress passed a new Agricultural Adjustment Act,[5] scrupulously avoiding processing taxes and any other devices likely to encounter judicial disapproval, but nevertheless aimed, like the ill fated measure of 1933, at restricting agricultural production Without abandoning the conservation tie up of 1936, the measure sought its objective by providing that

[4] 49 *U S Stat at Large* 163 The act is administered by the Soil Conservation Service in the Department of Agriculture

[5] 52 *U S Stat at Large* 31

1 If in any year the production of wheat corn, cotton, rice, or tobacco threatened to create a surplus that would break the price, the new Agricultural Adjustment Administration now set up (absorbed in 1945 into the present Production and Marketing Administration) should take a referendum among the producers of a given crop on the desirability of imposing limitations for the next crop year

2 If two-thirds voted favorably, the A A A, operating through state committees should allot to each producing county for that year, on the basis of the average acreage seeded during the preceding 10 years, the number of acres that might be planted to the given crop

3 Within each county and with the cooperation of elective local farmer committees an allotment should be made in turn, to each producing farmer, of a maximum acreage from which he might market products without restriction

With the measure taking immediate effect, machinery for farmer referenda and management soon was in operation, and, fully sustained by a now reconstituted Supreme Court,[6] the scheme proved both efficacious and popular during the brief period before conditions were sharply changed by World War II Together with soil conservation payments, it still is the principal means by which crop restriction where desired, is undertaken

Wartime interlude

Little, however, did the authors of the 1938 legislation dream that the day was near when for a period the country's main agricultural problems would be those of increasing production and building up surpluses But so it turned out Even before the United States became a belligerent in 1941, the expanding need for American foodstuffs in the war-torn democracies, the assistance provided under 'lend lease' legislation, and the growth of consumer demand in our own country arising from our defense effort, impelled the Department of Agriculture to announce a farm program for 1942 calling for "the largest production in the history of American agriculture", and throughout the war years emphasis was at all times on increasing output rather than restricting it The period was a difficult one for the farmer conscription left him short of labor, and agricultural machinery was hard to get. Under a general system of price control, however, prices of what he had to buy were held down, and for what he had to sell, he had the benefit of government supported prices and sometimes of special production subsidies besides

## POST-WAR PRICE SUPPORT PROGRAMS

A new approach to parity

Starting with the Agricultural Adjustment Act of 1933 and including the act of 1938, the basic purpose of New Deal farm legislation was to recover for farmers the position in the national economy which developments after World War I had cost them Essential to this was prices for their products similar to those received before 1914—in other words 'parity' prices, or something approaching them Under the initial legislation, this was left to be achieved, as well as might be, through voluntary compensated crop reduction Gradually, however, the idea grew that greater certainty should be imparted by government guarantees of minimum price levels, supplemented by government subsidies making up any differences between actual

[6] Mulford v Smith 307 U S 38 (1939) Wickard v Filburn 317 U S 111 (1942)

prices and the levels fixed, and a major stimulus to high production during World War II took the form of assurance for the farmer that for whatever he marketed, regardless of scarcities or surpluses, he would receive an equivalent of 90 per cent of parity (i.e., 1909-14) price in the case of nearly a dozen staple commodities and from 60 to 90 per cent in the case of lesser ones—levels indeed actually exceeded most of the time for most commodities.

Rival postwar plans

Guarantees of these sorts, rooted in the legislation of 1938, helped keep the country supplied with indispensable foodstuffs and raw materials and of course contributed to farm prosperity. But they operated also to raise the cost of living, and after wartime pressure was off, demand arose for scaling down the program sufficiently to afford the consumer some relief. To this end, a Hope-Aiken "flexible parity law" of 1948 [7] provided that, starting in 1950, the 90 per cent rate should apply only to commodities in short supply, while for those in normal supply the rate should be 75 per cent and for those still more abundant 60 per cent. Declaring the farmer "short changed," President Truman signed this Republican measure reluctantly, and, with numerous alternative schemes agitating Democratic circles, threw the Administration's support to a "production payment" plan associated with the name of Secretary of Agriculture Charles F. Brannan, and proposing (1) abandoning price supports altogether, (2) allowing prices of farm products to find their own levels in the open market, and (3) compensating the farmer out of the public treasury (to a maximum of $25,000 a year for any individual) for any losses suffered from the change of system.

Price supports under the Agricultural Act of 1949

Few suggested programs in the long history of our agricultural policy-making have stirred more heated controversy than this. On the one hand, the promise of lower living costs made strong appeal, especially in cities. On the other, the limitation upon subsidies was disliked by large producers, and, more serious, the burden to be imposed on taxpayers not only was quite unpredictable, but easily might more than offset the gain from reduced living costs. In Congress (although Democratic), the plan—even a suggested "trial run" with one or two selected commodities—encountered stone wall opposition, and while sentiment for something different from the Hope-Aiken Act proved strong enough to lead, in the autumn of 1949, to a substitute Agricultural Act [8] setting aside that ill-fated measure before it had a chance to operate, the new law not only showed no influence of the "Brannan Plan," but continued price supports and even in the end preserved the Hope-Aiken "flexible" principle. This it did by providing for (1) retention of 90 per cent supports through 1950, (2) lowered supports in 1951 on a sliding scale of from 80 to 90, (3) further reduction thereafter to a scale of from 75 to 90, and (4) for four years, parity calculations on alternative bases, i.e., average price in 1909-14 or in the past 10 years, whichever was more favorable to the individual farmer. And this is the point where the prolonged controversy now rests, with certainly no finality attained but at all events the Brannan Plan considered dead.

[7] 62 *U. S. Stat. at Large*, 1247.
[8] 63 *U. S. Stat. at Large*, 1051.

## THE PROBLEM OF SURPLUSES

Proposed solutions

Except during, and for three or four years after, World War II, when possible shortages were a source of concern, the root of all our agricultural troubles has been farm surpluses, if there were no surpluses or threat of such, farm prices normally could safely be left to take care of themselves Despite all efforts to control production, however, surpluses persisted through the thirties and have been with us again since 1949 Farmers cannot be *compelled* to stay within fixed acreage limits, even if they do so, unusually favorable growing conditions may result in larger crops than intended or expected, and, except during emergencies, surpluses inevitably continue to pile up Various remedies aside from or in addition to curtailing production, have been proposed The act of 1938 envisaged a plan associated principally with the name of Secretary of Agriculture Henry A Wallace and commonly referred to as the "ever-normal granary" In good crop years, surplus farm commodities were to be stored and held for use in poor years, with the hills and hollows leveled out and some long-term stability achieved Surpluses stored might represent non perishable crops raised by farmers on excess acreages, placed under government seal in elevators or warehouses, and later disposed of by the owners on the open market at the supported price as above or, under unfavorable conditions, taken over by a Commodity Credit Corporation (probably at a loss to the government) in lieu of repayment of Corporation loans ostensibly secured by the given commodities Or they might represent surplus products (most often perishable ones) purchased outright by the Corporation to keep them off the market

On its face, the Brannan Plan offered a still simpler solution No surpluses should be stored, but, with artificial supports removed and commodity prices left to be governed by the law of supply and demand, prices, it was argued, would fall to levels enabling the public to buy and consume more freely, and surpluses themselves would disappear As already indicated, one catch to this scheme was the heavy general taxation that would be required for bolstering farm income in lieu of regular price supports, another was uncertainty whether in operation the plan actually would take care of surpluses so handily, and, as pointed out, the plan has fallen by the wayside

The Commodity Credit Corporation at work

Starting in 1933 as an independent establishment, the Commodity Credit Corporation today, as a unit in the Department of Agriculture, has many and varied responsibilities, not excluding purchase abroad of non-competing commodities needed in this country Chiefly relevant here, however, are the management of the price-support program described and the handling—purchase, storage, sale, and gift—of farm surpluses From the beginning, surpluses were worked off in some degree by (1) export to foreign countries, where, however, they often could not be "dumped" without disturbing national economies, (2) sales within the United States (often at ridiculously low prices), notwithstanding that farmers generally opposed such competition with their current crops, (3) distribution to charitable institutions, (4) pro-

vision for free hot lunches for school children, (5) distribution of food stamps among eligible low income families, to be used in exchange for specified commodities at local stores, and (6) simply throwing commodities away after they had been held so long as to have become unfit for use Amid war conditions, the food stamp enterprise was terminated in 1943 On the other hand, the school lunch program was placed on a regular basis in 1946 and soon was accounting for upwards of a $100 million a year of 'federal aid' in the form of surplus foodstuffs

Some disturbing results

All this, however, has relieved the Corporation of only small fractions of the vast stocks accumulated under its loans on stored commodities or by direct purchase When the Agricultural Act of 1949 was passed, one third of the previous year s cotton crop was being held on loans, four fifths of the flax crop, nearly one third of the country s wheat, three fourths of its peanuts, two fifths of its potatoes one half of its butter and a dried egg supply ample to meet demands for nine years At that time, the Corporation had $4 75 billion for price support use, and in 1950 Congress voted an additional $2 billion Ostensibly, of course most of the vast sums employed do not represent expenditures—only loans and the Corporation claims to have lost, to 1951, only about $ 5 billion [9] Frequently however, commodities have to be taken over in lieu of cash payment of loans, in some situations, outright purchases have to be made, and, all in all, the enterprise is costly In addition is the unhappy circumstances that while the government holds, for example, millions of tons of eggs and billions of bushels of potatoes and permits vast quantities to spoil rather than put them on the market, the indignant housewife must go on paying stiff prices for the commodities or cannot afford to buy them at all Urban consumers protest, but well organized farm blocs and lobbies go into action at any sign of weakening of the government s resolution to keep agriculture prosperous and on an even keel, or of its present disposition to do so by keeping surpluses off the market and guaranteeing good prices for what remains [10]

## CREDIT FACILITIES

A growing need

When in earlier days of more diversified agriculture, a farmer wanted to acquire additional land make improvements or perhaps carry over a crop in the hope of a better market he normally must turn for funds to a regular commercial bank, and of course a considerable amount of such borrowing still goes on Commercial banks, however, always have been interested primarily in serving the needs of industry and commerce and, if loaning money at all to farmers and stockraisers (regarded as greater risks), have been likely to do so only on less favorable terms, including higher rates of interest An average county seat bank, loaded up with farm mortgages,

[9] A figure however much too low During a single recent year (1950 51) $?90 6 million

may be wiped out by a succession of crop failures, just as mortgage fore closures may cost borrowers their farms Moreover, in recent decades a steadily increasing proportion of agriculture has ceased to be diversified and become specialized Cotton farmers there always were, but now we have, in addition, wheat farmers corn and hog farmers, dairy farmers, fruit farmers ranchers and what not, and while some of these, especially dairy farmers may have proceeds coming in practically all of the time, it is characteristic of most of them to have little income except at one or two periods of the year when cash crops or herds are ready for marketing To normal farmers needs for credit on favorable terms are therefore added special demands arising from this newer situation

The federal farm loan system of today

The result has been the growth, over the past 35 years, of a country-wide system of credit institutions—a network of banks and other agencies—authorized, supported, and regulated by the federal government, and operated exclusively for service to the farmer The development started in 1916, when Congress passed the first piece of federal farm credit legislation in our history, a Federal Farm Loan Act, viewed in some quarters as dubiously "radical," yet with objectives which both major parties had warmly endorsed in the last previous presidential campaign Other legislation followed, leading gradually to a credit structure with the following present principal features

1 A federal *land bank* in a principal city of each of 12 farm credit districts into which the country is divided such banks making long term mortgage secured 4 or 4 5 per cent loans through local farm loan associations to individual members for purchasing land equipment or livestock, improving land, constructing buildings, or liquidating debt

2 A federal *intermediate credit bank* in each district making loans to production credit associations banks for cooperatives livestock loan companies and similar financing institutions

3 A *production credit corporation* in each district serving the farmer who wants not long term credit, but loans for a few months or a year and secured, not on land but on livestock corn wheat or other commodities

4 A *bank for cooperatives* in each district providing a permanent source of credit on a sound business basis for the multiplying numbers of farmers' purchasing marketing, or other cooperative associations

Success achieved

All of these different layers of credit institutions are coordinated under a central Farm Credit Administration in the Department of Agriculture—an establishment which, although only a coordinating agency for the many separate regional units mentioned, has through them become one of the principal banking institutions of the country In all of the regional associations farmers have a large share in management, and that extremely useful purposes are served is indicated by the fact that in a recent year (1948) the total of credit made available was no less than $1 7 billion The system has established a reputation, too, for sound and even conservative business methods The American farmer has plenty of problems quite apart from that of credit If, however, it be conceded that a prime essential is to enable him to retain possession of his land, and to continue supporting his family from it notwithstanding ups and downs in general agricultural conditions, it would seem that

facilities to that end could hardly have been provided more generously by an anxious *government, constantly prodded*, as of course it has been, by a powerful farm lobby [11]

## RURAL BETTERMENT

From activities directed to the scientific and economic aspects of farming, the national government has moved on in later years, especially since 1933, to what may be termed broadly the human, or social, aspects of the occupation Impelled to do this by rural backwardness and distress brought sharply to view by the depression of the thirties, and by the exclusion originally of all farmers and agricultural laborers—and even since the social security amendments of 1950, of all except some 750,000 of the latter—from the benefits of old age and survivors insurance, the Department of Agriculture, with a good deal of backing from Congress, now regards as part of its task the systematic promotion of better living conditions in rural communities Only two outstanding services of this nature can, however, be mentioned here

1 Relief for farm tenants

The agricultural credit institutions described above are designed primarily to benefit farmers who own, or have an ownership interest in, the land they cultivate Numerous other rural dwellers, however, cannot avail themselves of the facilities offered, for the reason that they own no land and little if any other property that might serve as security for loans Commonly excluded also from wage and hour provisions, unemployment insurance, and workmen's compensation, these less fortunate people are tenant farmers, share croppers, and farm laborers, who for 60 or 70 years have increased steadily in proportion to the number of farm-owners, and now comprise at least one-third of the total number tilling the soil They (or many of them) are the people who give rise to what is called the farm tenancy problem, and the areas where large numbers of them live, notably in the Southern and Southwestern states, form our "rural slums"

Following a penetrating and startling report in 1937 on the conditions and outlook of these submerged groups, submitted by a committee on farm tenancy appointed by President Franklin D Roosevelt, Congress in the same year passed the Bankhead Jones Farm Tenant Act, under which the government, operating through state and local machinery terminating in county committees of farmers, offers 40 year loans (at 4 per cent and up to $12,000) to farm tenants, farm laborers, and share-croppers (with preference for veterans) to enable them to acquire homes and lands of their own, and likewise "rehabilitation loans' (at 5 per cent and to a maximum of $5,000) for the purchase of livestock, seed, fertilizers, and farm equipment, for refinancing indebtedness, and for family subsistence, including medical care Under the direction of a Farmers Home Administration set up in the Department of Agriculture in 1946 (and of a previous Farm Security Administration which ren-

[11] All of the foregoing loan services too are quite independent of the lending operations of the Commodity Credit Corporat on and of the Farmers Home Administration which likewise, as indicated below lends extensively

dered impressive services during the great depression), these arrangements have achieved substantial results, a main obstacle of late being insufficiency of funds with which to meet even half of the applications received

2 Rural electrification

Until a decade or two ago, the United States lagged behind several other countries in bringing electrical energy within the reach of rural populations, and even today some 25 per cent of the nation's 5 4 million farms still are without electric light and power In 1936, however (when only 10 per cent of farms were electrified), Congress passed a Rural Electrification Act launching a long term program under which great progress has been made toward providing farms with cheap light and power, relieving the drudgery of the farmer and his wife, and adding to the farm's income-producing equipment Assistance is not given consumers directly But a Rural Electrification Administration in the Department of Agriculture makes long term, self-liquidating, two per cent 35 year, loans up to 100 per cent of cost (1) to associations (usually farmer cooperatives organized for the purpose), corporations, or local government bodies, to enable them to build transmission lines and, if desired, provide generating facilities and (2) to individuals or firms engaged in wiring farm buildings and installing electrical and plumbing appliances and equipment, and down to March 31, 1950 funds to a total of $2 08 billion (usually borrowed by the R E A from the Reconstruction Finance Corporation) were loaned to 1,067 cooperative or corporate borrowers in 46 states, Alaska, and the Virgin Islands—making possible (along with another $210 5 million authorized) approximately 1,162,600 miles of line, serving 3,538,900 farms and rural dwellings Private utility companies also have, of course, been expanding their services in rural areas—sometimes, it is charged, with deliberate intent to discourage government financed undertakings About 60 per cent of all farms electrified since 1936, however, get their power through facilities made possible by the R E A

3 Rural telephone service

The government's task of rural electrification (although now slowed up somewhat by defense priorities) is expected to start tapering off within three or four years and to be completed considerably before 1960 In 1949, however, Congress decided to move also into the field of rural communications and passed an act authorizing the R E A to begin making two per cent loans to independent telephone companies, farm cooperatives, and non profit mutual associations to establish and extend telephone services for the 58 per cent of the nation's farms still without such conveniences, and the first such loan was approved early in 1950

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## CHAPTER 28

# The Conservation of National Resources —Some General Aspects

Earlier wastefulness

Perhaps it is inevitable that an energetic and growing people taking over a virgin continental expanse richly endowed by nature should be guilty of extravagance and waste So, at all events it has been in the United States where for 100 years good land was so abundant, and forest, mineral and other resources so apparently inexhaustible, that no generation felt much concern about economical use in its own time or possible shortages later on On the theory that the quickest and surest way to develop the country was to get its resources into the hands of people who would settle new areas, promote new industries, and expand national production, the federal government for a long time (state governments also within their more restricted spheres) prodigally sold or gave away agricultural land, mineral lands, forest lands and whatever else was available, to substantially any private individuals railroads or other interests desiring them For a long time, too, when good grass land was put to the plough and exposed to ruinous soil erosion or noble forests were devastated by rapacious lumber companies, or petroleum gas, coal and other mineral deposits were wastefully used, there were few to protest

The conservation movement

Toward the close of the nineteenth century, however, warnings began to be sounded not only that the supply of available public land was fast diminishing, but that continued heedless exploitation of forests minerals and other natural wealth would one day leave the country impoverished Sharing this apprehension was President Theodore Roosevelt, and measures for protecting and developing the country s resources became one of that chief executive s principal concerns A new gospel of conservation was preached with crusading zeal, studies of conservation problems were launched, and legislation was started which in the next quarter of a century gave land, forests, minerals water supply, and power sites at least a moderate amount of protection For a good while, effort was directed almost exclusively at the resources of the publicly owned parts of the country But gradually it became clear that if the nation was to benefit from conservation on the scale required for its future well being controls would have to be extended, so far as constitutionally possible to privately owned areas as well, and such broadening of scope—spurred by the depression of the thirties by recurring droughts, dust storms, floods, and

other disasters, and eventually by necessity for maximum utilization of our resources (the "sinews and muscles of our *defense machinery*") *for national* defense and war—became the contribution of the era of the second Roosevelt

What conservation means

In the course of this development, too, the concept of conservation under went significant expansion At the outset, it was largely limited to maintaining in adequate supply resources like forests which, as used, could be renewed, *and to eliminating avoidable waste of others, such as oil and gas, not capable* of replenishment It still includes these things, of course, and extends to many kinds of resources not originally envisaged But to this somewhat negative objective of simple replacement or avoidable depletion where replacement is not possible has been added the notion of conservation as a more positive policy of building up and utilizing resources for the maximum satisfaction of social needs As the Department of the Interior put it in a report of a decade ago, conservation now means 'the management and wise use of natural assets to prevent their depletion and at the same time to *produce wealth* "[1] Hence it means not only preventing existing farms from being ruined by soil erosion, but making new farms available through provision of water for irrigation, not only protecting existing forests from devastation, but developing means for their wise use, with additions meanwhile from lands too worn out or otherwise marginal to be worth much for other purposes, not only keeping oil and gas from burning in the fields, but restricting output in the interest of coming generations

Federal state relations

From every point of view, conservation is an appropriate field for govern ment action, and indeed quite dependent upon it The rugged individualists who developed the country in pioneering days proceeded on the principle of taking and using what they found, and, left to themselves, their more sophisticated but hardly less individualistic descendants probably would have not much more regard for the interests of posterity Moreover, *the tasks involved* (including planning) are of such magnitude that only government can under take them Like so many others of our public enterprises, however, the work of conservation is considerably complicated by our federal system Up to a point, it is true, the national government has free scope As we shall see, more than one fifth of the country (mainly but by no means exclusively west of the Mississippi) is owned outright by the nation as a whole, and on this "public domain" the national government, as proprietor, can lease grazing lands, restrict access to minerals, regulate the use of forests and plant new ones, control the exploitation of water power, protect wildlife, and, speaking broadly, do anything else that it likes, with no constitutional questions raised And here, of course, is where conservation activities have been pursued most vigorously and effectively

[1] *Why a Department of Conservation* 75th Cong 3rd Sess Sen Doc No 142 (1938), 3 How appropriately the Interior Department (dating from 1849) might be renamed Department of Conservat on or of *Natural Resources* —as often suggested—is indicated by the ... her divis ons (1) Bureau of Land Management (2) ... rvey (4) Bureau of Mines (5) Fish and Wildlife

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[illegible] Sen Doc No 142 (1938) 3 Depart [illegible] by the [illegible] nt (2) Wildlife [illegible]

The greater part of the country's resources, however, are in areas over which the national government has no control as owner, and in these it falls mainly to the states and their subdivisions to do whatever is done The results are very uneven Some states have well developed programs covering forest protection and extension, control over water resources, regulation of oil and gas production promotion of drainage and irrigation projects, and protection of fish and other wildlife, according as such activities are appropriate to particular states Other states are lax, some do not even have a department of conservation, a planning board, or other such agency In any case, plenty of room is left for national authorities to help out—which indeed they must do if there is to be any approach to effective conservation the country over

Nor in spite of constitutional limitations are means for such participation lacking Through discussion and published information, the federal government can educate the people on the subject Through grants in-aid, it can join with the states in financing and controlling conservation activities Its commerce power can be invoked in regulating the development and use of navigable streams, the sale of hydroelectric energy, and the interstate transmission of oil and gas, and its treaty making power in protecting migratory wildlife Through voluntary arrangements, carried out in conjunction with states, it can enlist farmers in programs of soil conservation, and from these in turn derive means of controlling crop production All of these things not only can be, but are being, done, and it is reasonable to expect that as time goes on conservation, like many other activities cutting across federal-state lines, will more and more be nationalized

## LAND—SOIL—WATER—FORESTS—MINERALS

Public lands

Federal conservation activities have to do, first of all, with the most basic of natural resources, i e , land At one time or another, nearly 1 5 billion acres, or approximately 80 per cent of the entire continental United States, have been 'public land, i e , land nationally owned Vast quantities were in earlier days granted to states in aid of education and internal improvements, later on, much was bestowed upon transcontinental railroads, a great deal was allotted to soldiers and sailors, large tracts were sold to speculating land companies, under the Morrill Act of 1862, much went to the states for "agricultural and mechanical' colleges, and under a Homestead Act of the same year—offering 160 acres to any person who would pay a registration fee of $10 and occupy his holding during a period of five years—millions upon millions of acres were parceled out among pioneering home-seekers Prodigality and fraud often went hand in hand, yet vast areas passed into the possession of thrifty populations which have helped make the country what it is today Of some 413 million acres now comprising the public domain, 180 million are included in national forests some 56 6 million in more or less permanent Indian reservations, and more than 11 million in national parks, wildlife refuges, reclamation projects, and military and naval reservations Allotments to private individuals suspended in 1935, were resumed in 1946, but on a very restricted scale, and it is expected

that acquisitions by purchase and in other ways will in future more than offset any resulting depletion

Reclamation

Large stretches of the earlier public domain, located chiefly in the Western states, were arid or semi arid—much of the land fertile enough, but unproductive unless supplied with water, and since 1902 a Bureau of Reclamation in the Interior Department has been charged with conservation and distribution of limited water resources in 17 Western states—largely by dams, reservoirs, aqueducts, pumping stations, and the like—for irrigation, power development, and domestic and industrial uses In 1949, 65 completed projects—including Hoover (former Boulder) Dam on the Colorado and Grand Coulee on the Columbia—or divisions of projects were serving with water more than five million acres, producing crops worth over $500 million, and 35 power plants were in operation By irrigating lands and opening up farms, the government tends to aggravate its already serious problem of agricultural over production But it also meets a legitimate demand for cultivable land, three fourths or more of the federal funds expended are recovered from water users and power sales, *and in any event pressure of Western sentiment for such improvement is* too strong to be resisted Throughout its history, in fact, reclamation has been a fruitful source of sectionalism in politics

Soil conservation

For a good while before an unprecedented plague of devastating floods and dust storms prompted Congress, in 1935, to pass the Soil Conservation Act mentioned earlier in this chapter, it had been realized by agricultural experts that the country's most precious resource of all (apart from water), *i e*, soil, was being depleted in almost every area where land was ploughed, and in great sections of the West and Southwest with startling rapidity Yellowed rivulets and turbid major streams alike after every rain, testified mutely—as did also clouds of powdery dust borne eastward across the country by air currents in periods of drought—to the irrecoverable wealth that was being lost Fields once productive grew barren and useless, farm after farm went to ruin Starting its work under the legislation of 1935, a Soil Conservation Service in the Department of Agriculture reported in 1936 that, throughout the country as a whole, a total of 735 million acres of land (enough to make 20 states the size of Illinois), once well adapted to cultivation, grazing, or forest culture, had been seriously impaired or totally destroyed by either water or wind erosion, or both Ten years later the same authority still was obliged to say that half a million acres were being ruined by erosion every year, at a direct and indirect cost to the country of $3 billion

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told, [illegible]
never [illegible]
ates vigorously with states, localities, and individual farmers in bringing about physical adjustments in land and introducing soil conservation methods (contouring, strip cropping, terracing, crop rotation, farm drainage and the like), every state and major territory has enacted laws under which soil conservation districts (often coinciding with counties) for carrying out the program under direction of a state soil conservation committee and of locally elected

farmer committees may be set up, and by April 1, 1951 a total of 2,327 such districts, embracing over 70 per cent of all the farms in the country, had been organized Land-owners within any district have a right to help and guidance from field offices of the Conservation Service, or from county agents, and the Service undertakes to send technicians to advise and work directly with anyone in need of them A farmer may participate in the plan or not as he chooses But a powerful incentive is supplied by the fact that under the Soil Conservation Allotment legislation of 1936 federal subsidies are available only to those employing soil-conservation practices [2]

Water and water power

In most parts of the country, water is something that is there when and where it is needed and people simply take it for granted But for city dwellers at least it is there only because government has provided for its capture, storage, purification, and distribution, and for the nation as a whole water raises problems as serious as does any other resource One such problem is that of scarcity chiefly in the West and Southwest, and to meet it the federal government not only spends heavily (through the Bureau of Reclamation) on public works designed mainly or solely for irrigation, but cooperates with various states in enterprises intended to conserve and enlarge the water supply of the vast "dust bowl" area in the Great Plains region A second problem is that of flood control, and over a long period the government, operating through various agencies, has spent heavily on dikes, dams, and other works for restraining high waters—sometimes with that object solely in view, but in later days more frequently with other objectives also, such as navigation, irrigation, and power development

And a third problem is this matter of hydroelectric power The great river systems with which the United States is favored afford almost limitless opportunities for harnessing and utilizing water power, and so long as their policies do not conflict with federal prerogatives, the states may control hydroelectric power generation and transmission as they like In a number of ways, however, the national government has been drawn into this same field of activity To begin with, the Engineer Corps of the Department of the Army has supervision over all dams and other structures affecting the navigability of inland waters [3] In the second place, there is full national authority to control the construction and use of hydroelectric plants on streams flowing—as many do—through the public domain A third national right is that of regulating the transmission of gas and electricity across state boundaries And a fourth form of activity is government building of dams in key locations on important rivers with a view not only to improvement of navigation, flood control, and perchance irrigation, but also production and sale of power, with supervision in a Federal Power Commission of five members clothed with authority to license water power projects undertaken on the public domain or on navigable waters elsewhere, and also to regulate rates, services, and the issuance of securities

[2] The Service also buys up land not adapted to cultivation and improves it usually for grazing and forestry purposes

[3] Rivalry and duplication between the Corps of Engineers and the Bureau of Reclamation is a costly defect of our present water-control program

Forests

As a definite program, conservation in this country really had its beginnings 50 or 60 years ago in an effort to preserve and extend the nation's forests Theodore Roosevelt not only perceived the immense value to the people of forests yielding lumber, stabilizing the distribution of moisture, preventing soil waste, fostering wildlife, and furnishing recreational facilities, but deplored the rapidity with which forest wealth was disappearing at the hands of lumber companies and other private exploiters Under legislation dating from 1891, he and later presidents set aside generous portions of the public domain as national forests Envisaging a forest program for the entire country, Congress in 1911 provided for extensive purchases for forest purposes on the watersheds of navigable streams, wherever situated And purchases of still other submarginal areas later were authorized As a result, the United States has today, under custody of a Forest Service in the Department of Agriculture, a total of 152 national forests, situated in 40 states and territories, and with an aggregate area (180 million acres) considerably exceeding that of the state of Texas Many states, too, have set apart forests or created parks of their own, and in reality not far from one-third of the country's total wooded territory (630 million acres) benefits from direct federal or state protection To be sure, federal (and usually the state) forest areas are not simply walled off as reserves for the future Timber is cut and marketed by private operators, under federal or state supervision, selected tracts are leased for grazing purposes, and nearly the entire expanse is open to campers and other recreation-seekers, under regulations permitting no damage to the wooded growth The first consideration, however, is the preservation of the forests as *forests*, and to that end they are given protection against fire, insects, disease, soil erosion, flood, and damage from indiscriminate grazing, as well as destructive cutting In areas that require it, systematic planting of young trees likewise is carried on—which is well, considering that we are still cutting our saw timber faster that we are growing it [4]

Minerals

On the whole, the forest situation is encouraging, at all events, it is controllable—forests can be replenished, or even created where none existed before The situation as to minerals is far less favorable, once exhausted, these cannot be replaced, and in the last 50 or 60 years a machine civilization and mechanized warfare have taken heavy toll of resources once lightly viewed as relatively inexhaustible It so happens that the bulk of the country's minerals of primary concern to industry and defense—coal, iron, oil—are located in areas outside of the public domain, and federal policies looking to preventing their wastage have to be more or less indirect, *e g*, in the case of oil, through regulation of interstate and foreign commerce Mineral deposits on the public domain, however, also are important, and there systematic protection is afforded under a policy of the past 40 years by which (a) when such land is alienated to private persons or corporations, the government reserves all mineral wealth contained, to be kept intact or exploited only under such terms as the government may impose, and (b) when land remaining publicly

[4] Wildlife—fish wild animals and birds—is another resource which both federal and state governments seek to protect.

owned is leased for any purpose, no mineral rights pass with it except such as the government specifies, and with royalties on any minerals extracted paid into the federal treasury and in part passed on to the appropriate states In these and other ways, it is believed, about as much is done to conserve the scarcer minerals as circumstances permit Increasingly, also, the domestic supplies of minerals like iron ore are being supplemented by imports

Petroleum

Only 2 per cent of the oil produced in the United States today comes from the public domain, and although the amount produced on state-owned lands is larger, the great bulk of the 1 5-billion-barrel annual output is yielded by lands that have passed into private ownership—which means that whatever is undertaken by government in the interest of conservation must, by and large, proceed by public regulation rather than by management of a resource still in public possession Until within the last 25 years, not much was accomplished and wastefulness ran riot, only after discovery of the rich eastern Texas fields in 1930 31, catapulting output and shattering prices, were two lines of action started which in time led to the restrictive system that we now have—(1) interstate agreement and (2) federal control through the power to regulate interstate commerce

The first of these did not begin auspiciously In 1931-32, Texas, Oklahoma, and Kansas tried, by agreement to discourage over-production and price demoralization by forbidding shipments exceeding fixed quotas from the respective states In spite of all that they could do, "hot oil" streamed into other parts of the country, production continued at extravagant levels, and chaos prevailed But the excess oil was shipped in interstate commerce, and this gave the federal government an opening In the National Industrial Recovery Act of 1933, the president was authorized, with a view to helping the states out of their dilemma, to prohibit the transportation in interstate or foreign commerce of any petroleum or its products produced or withdrawn from storage in excess of amounts permitted by state law or regulation, and a code for the oil industry, was duly put into operation Here again, there was discouraging experience Tested in the courts, the arrangement collapsed in "Hot Oil" cases of 1935, the Supreme Court ruled that Congress had exceeded its constitutional authority by delegating to the chief executive power which by its nature was tantamount to making laws Even now, however, the damage was not irreparable To begin with, the states returned with fresh vigor to the policy of cooperative regulation, and, with advance authorization from Congress, four of them entered into a new compact prorating volume of production and of allowable interstate or foreign shipments, with, by 1945, 17 (producing 80 per cent of the country's oil) adhering to the plan Moreover, Congress followed up its rebuff from the Supreme Court by passing the Connally ["Hot Oil"] Act of 1935 (for two years, but later renewed) *directly* forbidding the same sorts of interstate and foreign commerce in petroleum and its products which previously the president had been authorized to prohibit, and to this the Supreme Court had, and could have, no objection Backing up the controls which the contracting states (now 20 in all) mutually agree to maintain, the interstate compact and the supporting act of Congress furnish

today, therefore, the country's two broadly based guarantees of reasonable husbanding of its rich but not inexhaustible oil resources [5]

## REGIONAL CONSERVATION—THE TENNESSEE VALLEY AUTHORITY

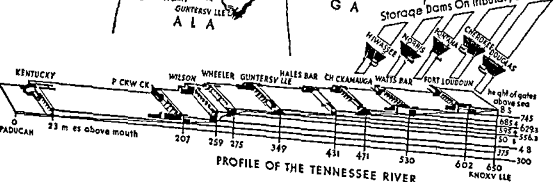
*The regional approach*

Conservation as practiced in this country draws heavily upon science and technology, it operates through legislation and administration, it sometimes gets into politics, and its pattern is fixed largely by geography, both physical and political Physically, the pattern follows the distribution of resources to be protected—land and water everywhere, forests in Eastern and Western wooded areas, power where the main rivers are, oil and gas in the richly endowed fields of the South and Southwest Politically, its planning and management are conditioned by the distinction between publicly and privately owned land, by the principle of federalism, by the allocation of constitutional powers, and by the framework of governmental and administrative units—states, counties, districts—lending themselves to the tasks to be performed Historically, different forms of conservation, whether nation wide like soil conservation or more localized like the maintenance of forests and parks, have been developed separately, and we still have largely independent land, forest, wildlife, mineral, oil, gas, water power, and other laws, authorities, and services, with dispersion aggravated by allotment of administrative responsibilities to many different departments and regulatory agencies Another approach would be to bring together most or all activities under a unified management functioning for a group of states or parts of states having common problems, and already we have one outstanding example of this procedure in the Tennessee Valley Authority, with others warmly advocated As a regional area for such treatment, the valley of a large river is most logical and convenient Serving often as political boundaries, rivers commonly are thought of primarily as dividing lines In reality, however, they usually unite rather than divide, their watersheds, to right and left, generally are alike physically, homogeneous socially and economically, and in need of the same protection for soil and forests and the same power and other services

Construction of works at Muscle Shoals on the middle Tennessee River during World War I for extraction of nitrogen from the air for use in manufacturing explosives left the national government in the possession of 2,300 acres of land, two nitrate plants, a power house, and Wilson Dam Postwar years saw much controversy over the use, if any, to be made of this property,

[5] In recent years, sharp controversy arose over whether first rights to rich "tidelands oil deposits located between low water mark and the three-mile limit of American jurisdiction [illegible]

the Senate


THE TENNESSEE VALLEY
KY
VA
TENN
NC
MISS
ALA
GA
Paducah
KENTUCKY
PICKWICK
WHEELER
STEAM PLANT
HALES BAR
Chattanooga
WATTS BAR
NORRIS
CHEROKEE
DOUGLAS
FORT LOUDOUN
FONTANA
Storage Dams On Tributary Streams
HIWASSEE
NORRIS
FONTANA
CHEROKEE
DOUGLAS
KENTUCKY
WILSON
WHEELER
HALES BAR
WATTS BAR
FORT LOUDOUN
PADUCAH
miles above mouth
207
259
275
349
431
471
530
602
650
745
300
PROFILE OF THE TENNESSEE RIVER

The Tennessee Valley Authority

1 Origin and purpose

and the problem was solved only when, urged by President Franklin D Roosevelt, Congress in 1933 passed a Tennessee Valley Authority Act[6] aimed at improving the navigability and promoting flood control of the 630 mile-Tennessee, providing for reforestation and proper use of marginal lands in the Tennessee Valley, encouraging the Valley's agricultural and industrial development, assisting national defense by operating government owned nitrate plants, and indeed pointed toward other objectives not at the moment fully specified Over an area of almost 41,000 square miles, embracing portions of seven states,[7] and having a present population of more than four million, agriculture and industry were to be regenerated, forests restored, soil erosion checked, mineral resources developed, cheap power and fertilizers produced, and the inhabitants assured the benefits of a "more abundant life," and to carry out the plan, a Tennessee Valley Authority was created as a wholly owned government corporation under a board of three directors appointed by the president and Senate, with authorization to employ a general manager

As envisaged by President Roosevelt and by the T V A itself, the project—sometimes termed the "keystone of the New Deal arch"—was a significant undertaking in democratic management and in the relatively new art of regional planning, blazing the way, it was hoped, for enterprises of similar nature and scope in other suitable sections of the country As viewed by people of contrary opinion, it involved not only unjustifiable use of national funds to promote a regional interest, but a venture in subsidized governmental competition with private business which would be unfair, uneconomical, and a flagrant abuse of federal authority, and the two points of view still are encountered whenever T V A affairs come up for discussion

2 Activities and achievements

From its inception, T V A was a multiple-purpose enterprise, and throughout its history it has been concerned with flood control, improvement of navigation, soil conservation, manufacture of fertilizers, reforestation, and development of power—itself directly engaging in enterprises like building dams, but, in the case of activities like soil conservation, rather providing funds and centralized planning, with administration decentralized, so that the area's people themselves and their governments may bear an active share in what is done Although by no means overlooking other objectives, the Authority (especially during its first 10 years) has focused its efforts mainly upon taming the unruly Tennessee River, thereby promoting navigability, reducing flood hazards, and, in particular, providing great quantities of electric power Twenty eight major dams on the main stream or its larger tributaries have been built or acquired, others are contemplated, and arrangements have been made for selling surplus power generated at these dams or at auxiliary steam plants to counties, cities, cooperative associations, and larger private industries (though not to individual consumers), with a view not only to recovering some portion of the huge expenses incurred, but also to providing a "yardstick" for measuring the fairness of rates charged consumers by private producers Agreements entered into with leading private power companies

[6] 48 *U S Stat at Large* 58

[7] Tennessee Virginia North Carolina Georgia Alabama, Mississippi, and Kentucky

have enabled the Authority to extend its market considerably beyond its own immediate area, several private utility properties have been purchased, and T V A now is the largest producer of electric energy in the country In meeting the urgent need for increased resources to vitalize our defense and war industries after 1940, the Authority proved an important asset, particularly helpful being the production of ammonium nitrate and phosphate fertilizers at Muscle Shoals and other points—nowadays supplied to thousands of farms for experimental use—and the stepping up of power production at the various dams, and, while an object of much continuing criticism and attack, partisan and otherwise, the experiment (admittedly well administered) is to be regarded as having justified itself, for purposes of peace as well as of war In cases decided in 1936 and 1939, the Supreme Court sustained all essential features of the underlying legislation [8]

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proposals. Bills for thes [illegible]
utility companies in som [illegible]
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threatening to frustrate action.

# CHAPTER 29

## Government and Labor

In addition to many professional people, millions of men and women in the United States—most farmers, many artisans, some tradesmen—pursue gainful occupations independently, in the sense that they work for no employer. Other millions, however, work only for employers, depend for their living upon the compensation received, and together constitute the element in our society commonly referred to as "labor." Under the common law as brought over from England, the employee-employer relationship is of a contractual nature, and a precious heritage of every American, expressly held by the courts to be included in the constitutional guarantees of liberty in the Fifth and Fourteenth Amendments, has been his freedom to enter, whether as worker or as employer, into such a relationship if and when he chooses—in other words, his "freedom of contract." In later days of tightened economic controls, this freedom has in various ways been somewhat curtailed. Even yet, however, it is in principle basic to the American labor system.

**Labor in the national economy**

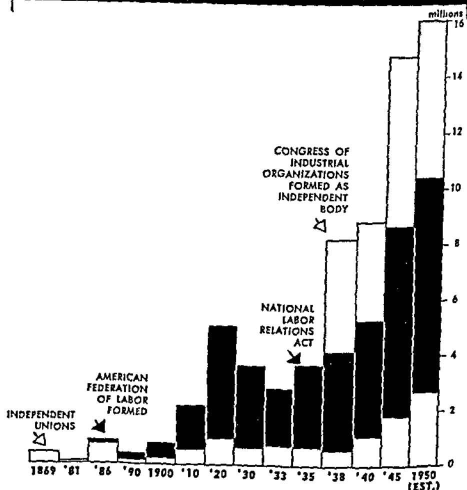
**1. Development of organization**

In early times, when most people worked only for themselves, such hired laborers as existed bargained individually with employers and obtained such terms on wages, hours, and the like as they could. Even before 1800, however, mechanics and artisans in larger cities began drawing together in unions, and as industry expanded and workers multiplied, especially after the Civil War, consciousness of a weak bargaining position without organization, combined with growing desire for improvement of labor conditions in sundry respects, led to unionization on a steadily increasing scale. Employers did not like what was going on, public opinion was skeptical, and in deference to old common-law doctrine, the courts long looked askance at unions as constituting, or threatening, "conspiracy in restraint of trade." The movement, however, went forward, and in time the courts, the public, and even practical-minded employers, accepted unions as not only inevitable, but—so long as keeping within the bounds of law—a legitimate means of enabling a vast segment of the working population to press in an articulate way for higher wages, shorter hours, and other benefits. In time, too, unions began drawing together in regional, or even nation-wide, federations. In 1881, a Federation of Organized Trades and Labor Unions became the common voice of organized labor the country over; in 1886, the present name of American Federation of Labor was assumed, and after this organization had held the field for another score

of years, seceding elements led by John L Lewis set up (in 1935) its lusty and sometimes more militant rival of today, the Congress (until 1938 Committee) of Industrial Organizations, carrying the labor movement more vigorously into the great mass-production industries

2 Resulting economic and political power

Not all of labor, of course, is as yet organized—indeed barely one quarter of it In a total labor force (including agricultural workers) of some 66 million, 107 unions affiliated with the A F L had in 1950 some 7 142 million members, 27 out of 30 identified with the C I O, and willing to divulge their membership reported 4 052 million, with the figure for all probably close to six million, and other important organizations, including the United Mine Workers of America and four railway brotherhoods, numbered among them between 2 and 2 5 million—a grand total of at least 15 5 million, as compared with some 3 million in 1933 And no one needs to be reminded of the vast economic power possessed, as evidenced by the control exercised by unions



over their own members, by the funds gathered and administered, by wage and hour scales pushed, upward and downward respectively, to levels where government itself has been induced to peg them, by the absolute dependence of government and citizenry alike upon what labor produces, by the freedom with which labor decides whether and where and how long it will stay on the job, by the paralyzing effects of great strikes of coal miners, railway employees, automobile workers, steel workers, and other groups both during World War II and in later years

Political power is impressive too, for although there has not arisen, as in Britain, a labor party contesting elections and presenting a united front in legislative halls, political influence is channeled through the two major parties, or sometimes through *blocs* cutting across them, expressing itself by supporting or opposing presidential congressional, and other candidates, contributing to campaign funds (through indirect channels, such as the C I O 's Political Action Committee since unions *as such* may not lawfully make contributions), planning and urging legislation, lobbying on a large scale in Washington and in state capitals, and, in general, employing whatever means and devices give promise of advancing the interests that wage earners, or at least their leaders, have at heart A principal impediment is the A F L - C I O rift, originally reflecting certain genuine differences, but nowadays kept up mainly by personal rivalries

Labor as a concern of government

In these days of pressure politics, labor often powerfully influences, and sometimes controls, government But government in turn, protects and regulates labor—if possible, even more than agriculture Purely local governments, it is true, have not much to do directly with the matter, at any rate beyond controlling working conditions among their own employees, and even here they are subject to the superior authority of the state But, as in the case of agriculture, the states can, and do, draw from their wealth of reserved powers wide latitude for regulative action To begin with, the employer employee relation is, as has been said a contractual one, and the states have power of enforcement as in the case of contracts of other kinds There is nothing too, to prevent a state, under its police power, from enacting and administering a wide variety of laws controlling the conditions under which work is carried on, so long, of course, as doing no violence to the national constitution and laws, and from fairly far back, most of the number have built up more or less extensive codes of labor laws covering such matters as hours, wages, closed shop, safety devices, compensation for injury, collective bargaining and the settlement of disputes Beginning with Massachusetts in 1869, all likewise have set up a state labor bureau or department charged with compiling statistics, promoting arbitration and conciliation, and enforcing state-wide labor regulations

1 State and local

2 Federal

Except in the form of slavery, labor receives no mention in the federal constitution, and in earlier days federal action relating to it was virtually confined to regulating work by the government's own employees and in time by employees of government contractors As industry grew, however, and labor problems multiplied, constitutional grounds were found for

trols throughout the entire broad domain of labor interests and relations (1) The power to tax and appropriate money for promoting the general welfare opens a way for the maintenace of a federal department of labor, for investigation of labor conditions and dissemination of information on the subject, and for providing systems of social insurance benefiting chiefly the laboring man and his family (2) The power to regulate interstate and foreign commerce makes possible the protection of the labor market by restriction of immigration and by tariffs curbing the competition of foreign-made goods, and, far more important, the control of conditions under which goods carried in both foreign and interstate commerce are produced (3) The power to regulate the jurisdiction and procedure of the federal courts opens a way for dealing with the problem of injunctions And (4) jurisdiction over the territories and the District of Columbia carries with it a control over labor in those areas at least as extensive as that of the states within their own boundaries Moreover, as itself the largest employer of labor in the country, the federal government has full inherent authority to regulate the pay and conditions of employment of its own workers

## EARLIER FEDERAL PROTECTIVE MEASURES

As a result, the national government has for many decades increasingly reenforced state control with both protective and regulative activities affecting the bulk of the nation's wage-earners As early as 1882, Congress enacted a Chinese exclusion law as a restraint upon the inflow of competitive labor, three years later, another measure debarred alien laborers, of whatever nationality, if under contract to individuals or corporations, and a lengthy succession of further immigration restrictions, culminating in the quota system instituted in 1921, have had as at least one of their major purposes the protection of American employment against swamping by foreign-born workers Creation of a Department of Commerce and Labor in 1903 likewise reflected federal concern, and 10 years afterwards labor influence brought about a separate Department of Labor designed "to foster, promote, and develop" the welfare of wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment [1]

[1] Never large as compared with most others the Labor Department has had a checkered history, particularly during the past six or eight years Matters falling within its jurisdiction often have been highly controversial and partly with a view to by passing it, a tendency

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Meanwhile, invoking its commerce and other powers, Congress entered the broad field of legislative action aimed at protecting labor against harmful exploitation As far back as 1840, the government became "an ensample to righteousness," when President Van Buren, by executive order, prescribed a 10 hour day for federal employees on public works, and in 1868 Congress followed by fixing eight hours as a day's work for all 'laborers, workmen, and mechanics" federally employed [2] Regulations of the kind for labor outside of government employment and employment by government contractors was not undertaken until early in the present century But in 1907 an Hours of Service Act limited to 16 the hours of consecutive work of persons having to do with the interstate movement of railway trains, and in 1916 the Adamson Act, passed at the behest of the railway brotherhoods, reduced the working day for all such persons to eight hours An Employers' Liability Act of 1908, applying to all employees engaged in interstate commerce, greatly liberalized the common law rules which under the old doctrines of "contributory negligence" and "assumption of risk,' had until then enabled carriers largely to escape liability for injury or death suffered by their workmen in performance of duty To a long suffering class of employees, a LaFollette Seamen's Act of 1915 extended guarantees of suitable food, clothing, and living quarters, reasonable hours, and regular payment of wages, and in 1920 the benefits of the Employers' Liability Act were given these workers also Significant, too, were clauses of the Clayton Anti Trust Act of 1914 repudiating any concept of human labor as "a commodity or article of commerce," declaring unions, as such, not to be illegal combinations or conspiracies in restraint of trade, and restricting the use of injunctions in labor disputes—although labor found the legislation disappointing when the courts insisted on whittling away most of the benefits expected to accrue from it Finally in 1932 a Norris LaGuardia Anti Injunction Act [3] made yellow dog' contracts, *i e*, contracts by which employees bind themselves not to join a trade union, unenforceable in the federal courts and expressly forbade injunctions to be issued against laborers for striking, for using union funds in aid of a strike, or for inciting others to strike, unless the employer could show that he had made every reasonable effort" to arrive at a settlement or that unlawful acts had been committed or threatened by the strikers

Protective laws based on the commerce and other powers

In one or two directions, the protective efforts characteristic of this first quarter of the century proved less successful When, in 1916, Congress undertook to restrict child labor in factories and mines by excluding from interstate commerce the products of establishments employing such labor, the Supreme Court held the measure void as regulating manufacturing rather than commerce, [4] when, in 1919, another attempt was made, on the basis of the taxing power, the result was similar, although of course on different grounds, [5]

Failure of measures for women and children

and when, in 1918, a minimum-wage law for women and children in the District of Columbia was placed on the statute-book, it fell before a judicial ruling that adult women were being deprived of freedom of contract guaranteed them in the constitution [6]

All in all the federal government by 1933 had concerned itself with labor conditions and problems on many fronts, and with significant results Everything to this point, however, proved merely a modest prologue to what was to come in the next two decades of depression, defense effort, global war, and reconversion to ways of precarious peace, and developments during this crowded period may next be reviewed under four main heads (1) the efforts made and devices invoked for promoting employment, (2) the improvement of labor standards through guarantees of collective bargaining, (3) the improvement of standards through a system of minimum wages and maximum hours, and (4) the search for just and effective means of preserving industrial peace Two further developments of concern also mainly to the laboring population—the introduction of a nation wide system of social security and encouragement of more and better low-cost housing—will be touched upon in the succeeding chapter

## PROMOTION OF EMPLOYMENT

*Unemployment a perennial problem*

When enumerating, in 1944, the famous "four freedoms" to which he believed people everywhere entitled, President Franklin D Roosevelt placed in the list "freedom from want"—the best guarantee of which is, of course, remunerative employment Under our American system of free competitive enterprise it has been axiomatic that any person needing to support himself or a family ought to have a chance to do so by honest toil The principle, however, is not always easy to realize in practice Regardless of how prosperous the times, the lag or collapse of particular industries, the shifting of others from one part of the country to another, changes in popular tastes and demands, new labor saving machinery and production techniques, and other developments constantly going on in the national economy, throw people out of work, and at best—even in periods of stepped up production such as during World War II and the rearmament effort launched in 1950—there always is a substantial margin of unemployment [7] while in periods of economic recession and stagnation the proportion may mount to appalling levels The problem—if not of averting unemployment completely, at least of holding it to a level not seriously damaging to the economy—is, therefore, practically always with us

*Some devices for minimizing it*

State and national governments long have concerned themselves with the matter, approaching it through four principal avenues (1) regulations calculated to reserve the labor market for adult American citizens, (2) employment agencies and other services for bringing workers and jobs together, (3) in times of special stress, programs of public works, and (4) long range economic investigation and planning

[6] Adkins v Children's Hospital 261 U S 525 (1923)

[7] With civilian employment at a peak of 61 8 million in October, 1951 there nevertheless were 1 6 million unemployed

**(a) Promoting access to the labor market**

Efforts to curb child labor, while of course directed primarily toward protecting the children themselves, always have had the secondary purpose of preserving more jobs for adults. For a long time, not much success attended them. As indicated below, however, the Fair Labor Standards Act of 1938 went a considerable distance toward solving that particular problem. Efforts to protect the American worker against competition from workers abroad, or from alien workers resident in the United States, have taken the form principally of (1) protective tariffs laid partly or wholly with a view to keeping out of the American market commodities produced by cheap labor abroad, and thereby supposedly guaranteeing more work for American laborers and at higher wages, (2) restrictive immigration laws, reserving for American workmen jobs which, under a looser immigration policy, would go to foreigners, and (3) laws confining labor on public works to persons of citizen status. In private industry, it has been found impracticable to deny aliens the same right to employment as citizens, because in the view of the courts such denial is tantamount to refusing equal protection of the laws. State laws providing for such discrimination in connection with public undertakings have, however, been upheld, and since 1938 the federal government also has successfully maintained a policy of permitting no aliens to be employed on any federally aided work project.

**(b) Public employment agencies**

Even when jobs are plentiful, there is the problem of bringing job and worker together, and over so vast a country, with industries so diversified, and with costs and difficulties of seeking work except in one's immediate locality so prohibitive, the problem is indeed serious. For meeting it, a bewildering variety of employment agencies have made their appearance—agencies not creating work, of course, but only directing people to it. Some are conducted by individual employers or employer associations, some are maintained by labor organizations, many are private philanthropic or profit seeking enterprises. Even under regulation, however, private agencies long ago showed serious defects, and as early as 1890 public agencies also entered the field. For a time, these took the form chiefly of employment offices set up and operated by states. During World War I, however, an acute labor shortage led to the creation of a United States Employment Service in the Department of Labor, and although this agency has had a checkered history—in and out of the Department, and under varying names—its legatee, the Bureau of Employment Security, in 1949 found its way back into the Department where it logically belongs. *During World War II, all state employment services were* transferred to federal control. Restored to the states in 1946, however, they again operate with some federal coordination, and with the aid of federal grants introduced under the Wagner-Peyser Act of 1933—with national offices found in a few states having no services of their own.

**(c) Programs of public works**

In periods of heavy unemployment, state and federal governments alike may come to the assistance of the working population by instituting programs of public works calculated to provide jobs—as well as, of course, by direct grants for relief. The most striking illustrations of this "pump-priming" method of dealing with a slump in employment are, of course, afforded by the ex-

tensive programs embarked upon by states, and especially by the federal government, in battling the depression of the thirties Even during a mild recession experienced in 1949, however, effort was made to speed up federal building and improvements, with concentration upon sections of the country where the largest numbers were out of work

(d) Long range study and planning

Finally may be mentioned a new rôle played by economic investigation and planning Fearful of unemployment on a disastrous scale after World War II, President Truman, members of Congress, various economists, and sundry other persons feeling deep concern, threw their support, in 1945, to a full employment' bill predicated not only on the federal government's responsibility for preventing depression and unemployment, but on the conviction that, by promoting an "expanding economy," the government might be able to assure jobs permanently for substantially all people willing and able to work The plan was much too complicated to be explained in full here, but the essence of it was (1) that every year the president should transmit to Congress not only his regular fiscal budget, but also a "national production and employment budget," or economic budget, setting forth the policies which in his judgment should be pursued in order to maintain high-level production and full employment, (2) that if storm signals showed, this budget should propose measures necessary to keep the economy on an even keel (*e g*, tax reduction as an incentive to business expansion, public works undertaken by state and local governments, if necessary, public works and other employment making undertakings by the federal government as well), and (3) that it should be just as much the duty of Congress to consider, and so far as possible implement, the economic budget as the fiscal budget The heart of the scheme was the close study, forecasting, and planning designed to lie behind the president's recommendations, together with the statutory obligation of Congress to act on what was submitted to it

The Employment Act of 1946 and the president s Council of Economic Advisers

Many people considered the plan well meant, but naive, and despite much urging from the White House, Congress eventually adopted it, in the Employment Act of 1946,[8] only after whittling it down to provide simply for (1) an "economic report' each year by the president to Congress, covering levels of employment, production, and purchasing power, current and foreseeable trends, the government's "economic program," and recommendations for legislation, (2) a council of three full time economic advisers to maintain constant watch over the economic situation, keep in touch with the president concerning it, and assist in preparing the annual report, and (3) a joint congressional committee on the economic report, composed of seven members from each house, and charged with planning ways and means of carrying out the recommendations made and reporting them for action Set up as a unit in the Executive Office of the President, the projected Council of Economic Advisers has been functioning for some six years, and notwithstanding past differences of viewpoint, the public utterances of members, and especially the presidential reports based on their findings (now presented to Congress semi annually), command anxious attention from everyone concerned about

[8] 60 *U S Stat at Large*, 24

the nation's economic outlook Workers still, of course, enjoy no legal right to jobs But a president and a party wishing to stay in power will be well advised to see to it that employment is kept at a high level

## IMPROVEMENT OF LABOR STANDARDS—COLLECTIVE BARGAINING

The National Industrial Recovery Act (1933)

Even before the remarkable outburst of labor legislation associated with the earlier years of the New Deal, Congress enacted many laws aimed at improving working conditions in industry With raising labor standards as one of its many objectives, the National Industrial Recovery Act of 1933, however, went farther than any previous measure, because under its famous Section 7(a) all codes of fair competition adopted by the various industries in accordance with the law (and affecting interstate commerce) were to (1) set minimum wage levels, fix maximum hours, eliminate child labor, and otherwise improve working conditions, (2) recognize the right of employees "to organize and bargain collectively through representatives of their own choosing," and (3) protect every employee and person seeking employment against being required, as a condition of employment, "to join any company union or to refrain from joining " In laying down these and other regulations, the government not only evidenced a new concern about wages and hours for industry as a whole, but unequivocally endorsed labor unions as instrumentalities through which workers might collectively compel employers to live up to adequate wage and hour standards and otherwise maintain good working conditions A National Labor Relations Board, too, was set up in 1934 to conduct elections to determine employee representation for collective bargaining and to deal with controversies arising out of Section 7(a)'s operation With workers unionized, collective bargaining as an alternative to dictation of terms by employers or by workers alone, or perchance by public authority, became—as it ever since has remained (even under the Taft Hartley legislation of 1947)—the keystone of our national labor policy

The National Labor Relations Act (1935)

Momentarily, the expected gains were sorely jeopardized when, in 1935, large portions of the Recovery Act were voided by the Supreme Court Promptly in the same year, however, Congress, in response to urgent labor demand, and again invoking its commerce power, passed a National Labor Relations [Wagner] Act [9] salvaging practically the whole of Section 7(a) with its basic guarantee of collective bargaining To make such bargaining more free and effective, furthermore, "company" unions (ordinarily including all employees in a given establishment, and commonly dominated by the company officials) were outlawed, so that thenceforth all unions might be fully independent employee organizations, employers were forbidden to discriminate between union and non union workers, and, although one of the objects was to avert strikes, the act forbade its clauses ever to be so construed as to interfere in any way with the right to resort to such weapons Making universal and fully enforceable for the first time the basic rights to organize

[9] 49 *U S Stat at Large* 449

and to bargain collectively with employers (and the encouragement of such organization and bargaining was the act's central purpose), the legislation has from the first been prized by labor as marking perhaps the greatest gains ever achieved by it at a given time

The National Labor Relations Board

For enforcement of the measure, a new National Labor Relations Board of originally three but since 1947 five members (appointed by the president and Senate for five year terms), and with regional and subregional offices throughout the country, is assigned two principal functions first, to ascertain and declare who in any particular plant, are bona fide representatives entitled to speak for the employees in collective bargaining, and second, to hear and pass upon complaints against employers for denying or abridging employees' rights to organize, for refusing to bargain collectively, for discharging employees for union activity, or for indulging in other specified "unfair" practices Both forms of action are, of course, to be initiated, not by the Board, but by employees (or, under certain conditions in election situations, by employers)—the first, by filing petitions for elections to choose representatives or agents, the second, by filing complaints If after local investigation by an examiner (with perhaps a hearing in Washington), a complaint is sustained, the Board may issue 'cease and desist' orders enforceable in the courts

The act's constitutionality upheld (1937)

A measure as far-reaching as the National Labor Relations Act could not fail to be challenged in the courts, and since, down to this time, the Supreme Court always had held manufacturing, mining, and the like not to be commerce, and therefore not subject to federal regulation under the commerce power, it was widely expected that when the test came the Court would find the new legislation to be regulation, not of commerce, but only of labor conditions in manufacturing and other industries and therefore void The outcome, however, was far otherwise Even though the changes of personnel which were about to transform and liberalize the Court had barely begun, three five-to-four decisions handed down in 1937 [10] took the ground (1) that, although the manufacturing operations of the defendant corporations were carried on locally, the raw materials used and the finished goods produced were objects of interstate commerce, (2) that this invested the manufacturing processes themselves with the character of commerce and brought them within reach of the commerce power, (3) that therefore Congress had full right to require collective bargaining and otherwise regulate labor conditions in plants so situated, and (4) that the Labor Relations Act was wholly constitutional In these crucial decisions, the Court practically at a stroke so modernized its interpretation of the commerce power as to enable the national government to deal freely with the realities of American business today

[10] National Labor Relations Board v Jones & Laughlin Steel Corp 301 U S 1 (1937), National Labor Relations Board v Fruehauf Trailer Co 301 U S 49 (1937) and National Labor Relations Board v Friedman Harry Marks Clothing Co 301 U S 58 (1937)

## IMPROVEMENT OF LABOR STANDARDS—WAGES, HOURS, CHILD LABOR

The Fair Labor Standards Act (1938)

With the Labor Relations Act (also the Social Security Act of the same year) safely validated judicially, makers of policy in the Roosevelt Administration advanced to another significant line of action To this time, the federal government had dealt with wages and hours only in connection with its own employees, employees of government contractors, and employees of common carriers, and although the Supreme Court, after much wavering, had seemed to give state minimum wage laws a full constitutional bill of health, hardly more than half of the states as yet had legislation of the kind, in nearly all instances, laws on the subject applied only to women or to women and children, and only to certain industries, and the Supreme Court's shaky record on the subject afforded no clear assurance for the future Accordingly, in 1937 President Roosevelt called upon Congress for a federal law that would pick up where the defunct National Recovery Act left off by putting a "floor" (a minimum wage law) under wages and a "ceiling" (a maximum hours law) over hours and by abolishing child labor, and the result was a Fair Labor Standards ["Wage and Hour"] Act of 1938,[11] representing the government's most ambitious attempt as yet to regulate practical working conditions in industry Applying in general to workers of both sexes engaged in manufacturing, mining, processing, or transporting commodities moving in, or in any way affecting, interstate commerce—although not to employees of common carriers (covered in other statutes) or to other designated groups—the act laid down nationwide regulations on all of the subjects specified by the President, *i e*, wages, hours, and child labor [12]

(a) Wages

A minimum wage of 25 cents an hour was prescribed for the first year of the law's operation, 30 cents for the next six years, and in 1945 at the latest, the figure was, in general, to become 40 cents (it actually did so in 1944) With the sharp rise of prices during World War II and the ensuing inflationary period, however, any such wage base quickly became obsolete, and while after the war very few workers actually were receiving as little as 40 cents an hour, demand arose in labor circles, with support from the Truman Administration, for a higher statutory minimum Various amounts from 65 cents to $1 were advocated Seventy five cents, however, became a reasonable compromise, and in 1949 Congress wrote that figure, raising wages for more than a million workers, into the revised law

(b) Hours

In the act of 1938, 44 hours was set as the maximum labor duration per week during the first year of the law's operation, 42 hours during the second year, and 40 hours after October 24, 1941—with in all cases overtime pay at one and one half times the regular rate Within limits, however, the work-week may be extended by collective bargaining agreements, especially in industries requiring speeding up in certain seasons

[11] 52 *U S Stat at Large* 1060

[12] Amending legislation of 1949 at some points broadened the act s coverage of approximately 22 million and at others narrowed it

(c) Child labor

Finally, child labor was placed under drastic restriction by provisions prohibiting goods produced under conditions of "oppressive child labor" to be handled in interstate commerce—such child labor being defined as including the employment of any children under 16 in manufacturing or mining (in 1949, employment directly in transportation and commerce was added) —or under 18 in occupations declared by the Children's Bureau (now by the Bureau of Labor Standards in the Department of Labor) to be "particularly hazardous or detrimental to their health or well being" In occupations within the purview of the law, other than manufacturing, mining, transportation, and commerce, children of 14 or 15 may be employed in periods not interfering with their schooling and under conditions not injurious to their health and general welfare

Constitutionality and administration

Minimum wages were designed to increase mass purchasing power, and maximum hours (and restriction of child labor) to spread opportunity for employment Some people considered that wages and hours were matters that should be left to work themselves out simply through the operation of market forces, and correlation with shifting price trends undoubtedly promised difficulty Experience indicated, however, that natural forces alone cannot be relied upon to achieve the desired ends, and, with the Supreme Court unanimously sustaining the act of 1938,[13] federal as well as state regulation unquestionably has become a fixture[14] Except for its child labor provisions, enforceable by a "child labor and youth employment branch" of the Labor Department's Bureau of Labor Standards, the federal law is administered by the Department's Wage and Hour Division, with which has been joined under a single management since 1942 a Public Contracts Division having to do with enforcing similar wage and hour provisions of the Walsh Healey Act of 1936 applying to labor on government contracts exceeding $10,000

## PROMOTION OF INDUSTRIAL PEACE—CONSTITUTIONAL AND LEGAL ASPECTS

Throughout the years while labor was achieving the substantial gains outlined (and others as well), strikes, lockouts, slowdowns, boycotts, and other interruptions and disorders frequently inflicted heavy losses upon industry, labor, and the general public alike, and hard experience with work stoppages during World War II became responsible not only for unprecedented anti strike legislation at the time, but at least in part for the less favorable attitude encountered by labor in government and other circles after the war in contrast with the dominant pro labor mood of New Deal years

Limited role of the states

Until within the present century, the matter of labor management relations was left largely to the states, under their reserved powers, and by 1900 most of the number had legislation bearing upon it, with boards of conciliation or

arbitration existing in at least a dozen As, however, industry took on more of a national aspect, and its relations with labor grew in scope and complexity, the federal government was forced into action, and although under the influence of the postwar reaction, highlighted by the federal Labor-Management Relations [Taft Hartley] Act of 1947, more than two-thirds of the states enacted new restrictive legislation—most commonly banning the union shop, but in several instances prohibiting secondary boycotts and outlawing jurisdictional strikes and strikes by public employees—the federal government has in general so preempted the field that nowadays state agencies for handling labor controversies have relatively little importance outside of special compulsory-arbitration devices employed in Kansas, Michigan, and a few other jurisdictions

Bases of federal action

The powers of the federal government in this field have firm constitutional foundations *First of all is the basic responsibility for executing law and preserving order* If labor disturbances threaten the enforcement of any federal statute or the performance of any federal function *e g*, operating the postal service, there is self evident authority to intervene If a dispute localized within a particular state leads to disorders of such magnitude that the state authorities find it necessary to call for assistance the president may respond with federal troops, and definitely will do so if federal property or functions are endangered In such situations the immediate object is, of course, only to preserve law and order, although from the power to act may readily be deduced a right also to look behind what has occurred and take measures to prevent its happening again On the majority of occasions, however, when the government concerns itself with industrial peace it will be found acting by virtue of powers drawn rather from such constitutional clauses as those on interstate commerce and due process

1 The commerce power and the anti trust laws

Any industrial dispute having, actually or potentially, the effect of obstructing the free flow of interstate commerce *ipso facto* becomes a legitimate object of federal attention At one time it is true, *this did not mean much outside of* disputes involving railway or shipping employees or other people engaged directly in transportation With commerce now broadened, however, to include all manufacturing, mining and other productive enterprise having interstate or foreign aspects or connections, no very great amount of industry remains in which labor troubles are entirely beyond the federal government s reach As we have seen, a major product of the commerce power is the anti trust laws, and in turn these become a significant potential medium for federal restraint of labor disturbances When the Sherman Anti Trust Act of 1890 made illegal every contract and combination in restraint of interstate commerce, there was no mention of labor unions, and there always has been difference of opinion as to whether they were intended to be included Nevertheless in prosecuting the famous Debs case arising out of the Pullman strike of 1894 in Chicago the government invoked the anti trust provisions of the Sherman Act along with the undisputed power to prevent interference with the United States mails, and in the almost equally famous Danbury Hatters case of 1908, the Supreme Court *firmly took the position that the Sherman*

Act applied to activities of unions no less than to those of corporate combinations At the behest of labor, it is true, the Clayton Anti-Trust Act of 1914 cleared unions of the lingering charge of being illegal combinations or conspiracies in restraint of trade But, as judicially interpreted, this meant only that such organizations were exempt from the anti trust provisions of the Sherman Act in so far as they were 'lawfully carrying out their legitimate objects', and it was not until 1940 that a differently constituted Court declared the almost (though even yet not entirely) complete exemption enjoyed today [15] A case turning on labor violation of anti trust law still occasionally is heard

2 Due process clauses and injunctions

From the situation described, powers to deal with industrial disputes, in varying ways accrue to Congress, the president, and the courts For judicial action, however, there is still another approach No person, say the Fifth and Fourteenth Amendments in effect (and here, as for many other purposes, a corporation is a person) shall be deprived of life, liberty, or property without due process of law But by strikes, boycotts, and the like, labor organizations do undoubted damage to employers and investors (to say nothing of the general public), stopping production interfering with distribution, impairing income, and otherwise depriving the injured of property, often with no legal procedures invoked, and with a view to lessening such losses—for which it rarely is possible to get reparation through civil suits—employers long ago, through their lawyers, began applying to federal and state courts for writs of injunction ordering a union or other workers to refrain from work stoppages, picketing, or other actions from which the personal or property rights of employers would suffer The courts generally were responsive, and resulting injunctions might order a labor organization or group to continue performing specified acts or rendering specified services threatened with interruption, or to desist from practices resulting in wrongs for which there would be no legal remedy Moreover, disregarding such injunctions constituted "contempt of court," punishable by fine and imprisonment Theoretically, writs of injunction might be issued against employers as well as against labor Only rarely, however, were they so used, and one will not be surprised to learn that labor organizations always have been bitterly hostile to a device which has been used so frequently against them

When the Clayton Act of 1914 was passed, labor leaders saw to it that a clause ostensibly forbidding injunctions in industrial disputes, and based on the power of Congress to regulate the jurisdiction of federal courts, was inserted The courts, however, construed the provision quite narrowly, and it remained for the Norris-LaGuardia Anti Injunction Act of 1932 sharply to curtail the previously lengthy list of actions to which injunctions might be directed, as well as to extend to persons tried for contempt for ignoring injunction decrees the benefit of trial by jury As illustrated, however, by heavy fines for contempt imposed in 1946 on John L Lewis and his United Mine Workers of America and by court orders in 1948 against work stoppages both in coal-mining and in railway transportation, labor injunctions still are is-

[15] Apex Hosiery Co v Leader, 310 U S 469 (1940)

sued, and in fact the Taft Hartley Act of 1947 somewhat softens the previous restrictions upon them

## FEDERAL AGENCIES OF MEDIATION AND CONCILIATION

1 In the railway field

The most obvious place (aside from its own labor relations as employer) for the federal government to start trying to allay industrial strife was in connection with railroads, both because of the disastrous consequences of breakdowns in the country's transportation services and because under the commerce clause there could be no possible doubt about constitutional authority, and, starting with legislation dating from as early as 1888 and culminating in the Railway Labor Act of 1926 (strengthened in 1934), a scheme for handling disputes in that field was developed which, at least down to somewhat disillusioning experiences since 1946 was regarded as the best achievement of its kind in our experience The machinery employed is based on the principle of one mediating agency taking over when another fails, and a gradation of three agencies is provided for In event of a dispute between a railroad company (or an express, Pullman, or airline company) and its employees, either party may invoke the services of a standing National Mediation Board of three members appointed by the president and Senate, or the Board may volunteer its good offices In any case, it will endeavor to get the parties into conference and bring about a settlement Unsuccessful in such effort, it normally will turn the situation over to another federal agency, a quasi judicial National Railroad Adjustment Board, consisting of 36 members working in four panels, each with equal representation of employers and employees and each exercising jurisdiction over some particular branch of railway employment If the appropriate panel also fails (with perhaps by this time a strike voted or actually going on), one final step remains The president may at his discretion start negotiations afresh by referring the controversy to an 'emergency board' of his own choosing, whose findings and recommendations, it is true, will have no binding effect, but may be received with such public approval as to leave the contenders little practical alternative to accepting them Failure at all of these stages in connection with a threatened strike of trainmen and engineers in 1946 led the government, acting under wartime powers, to take over the roads and operate them temporarily, and with different organizations of employees involved, the experience was repeated in the spring of 1948 and again in the summer of 1950 Until these recent years, however, the machinery described always availed to avert imminent threat of interrupted transportation service, and on the strength of this record railways were left out of the Taft Hartley Act of 1947

2 In the field of labor generally

Of course the federal government s efforts in these later decades have by no means been confined to the field of transportation On the contrary, they have extended to labor of almost every sort, if having any interstate aspect When the Department of Labor was set off separately in 1913, Congress authorized it to act as a labor management mediator and to appoint commissioners of conciliation to aid in bringing about settlements of industrial disputes

throughout the country, whether or not having any interstate aspect; and between that date and its displacement under terms of the Taft-Hartley Act, a United States Conciliation Service in the Department, functioning through regional offices and of course supplementing similar activities of state conciliation services handled a total of 100,000 different disputes, some minor but many major and most of them successfully Never achieving entire effectiveness the Service was particularly baffled by strikes in vital industries during the national defense effort of 1940 and the ensuing war, and to reenforce its efforts a number of other agencies were tried, one after another, although in no instance with greatly improved results

Present arrangements

Passing over a long and tangled chapter of labor-management history during World War II—filled with controversies over anti-strike legislation, but nevertheless also with incessant labor disturbances rising to a hurricane after the war was over—we come for present purposes to conciliation arrangements existing since 1947, when the authors of the Taft-Hartley Act, considering the Conciliation Service faulty, decreed the death of that agency and the making of a new start The national government, of course, was not to relax its efforts in this field, on the contrary, the new measure devotes its entire "Title II" to "conciliation of labor disputes in industries affecting commerce," and with a special section on "national emergencies." But the charge (vigorously denied) that the Labor Department was unduly partial to labor led to transfer of the conciliation function to independent establishments, and these establishments, as operating today, became (1) a Federal Mediation and Conciliation Service under a director appointed for three years by the president and Senate, and empowered to set up regional offices (of which 12 now exist) convenient to localities in which labor controversies are likely to arise," and (2) a National Labor-Management Panel of six persons outstanding in the field of management and six similarly prominent in the field of labor, all appointed by the president and Senate, and charged with advisory functions In any non-transportation dispute threatening to affect commerce in more than a local manner, the Mediation and Conciliation Service may offer its aid, either on its own initiative or at the request of one or more of the parties, and if its efforts fail it must try to induce the parties to seek other means of settlement without resort to strikes, lockouts, or other forms of coercion

For threatened disturbances extending to an entire industry, *e g*, coal-mining, and imperiling 'the national health and safety," a procedure is prescribed as follows

Disturbances threatening national health and safety

1 Presidential appointment of a board of inquiry
2 Transmission of this board's report by the president to the Mediation and Conciliation Service
3 Request by the president or the attorney general to apply to a federal district court for an injunction against the threatened strike or lockout
4 Meanwhile, continued effort of the Mediation and Conciliation Service to bring about a settlement

5 If, after 60 days, no settlement is reached, the Service to take a vote of the workers concerned, by secret ballot, on their willingness to accept the employer's final offer

6 Upon failure of this and all other efforts, the president to report to Congress and lay in its lap full responsibility for handling the situation from there on

The "cooling off" intervals afforded by this plan, taken over from procedures relating to railroads, were stressed by Taft Hartley sponsors as minimizing the likelihood of actual work stoppages, with full publicity at all stages also contributing Disliking the legislation setting it up, President Truman has resorted to the plan only when circumstances compelled To 1950, however, the initial steps were taken in nine instances and injunctions issued in three of the number But no strike against which an injunction was issued went beyond the injunction's 60 day duration—although later in 1950 members of the United Mine Workers refused for a time to obey an order of John L Lewis (in response to an injunction) that they return to work

## LABOR-MANAGEMENT RELATIONS SINCE 1947

Without doubt, the two most important pieces of federal labor legislation in the past 20 years are the National Labor Relations [Wagner] Act of 1935—'labor's *Magna Carta*'—and the Labor Management Relations [Taft Hartley] Act of 1947 In form, the second is only an amendment to the first, which, except as altered, is still operative and indeed fundamental, and elements which for five years have vainly sought the amending legislation's repeal look to a restoration of the 1935 statute in full vigor, even though with a few modifications which they now would be prepared to accept The 1947 act, nevertheless, made so many changes and added so many new features to our accumulating labor law that it quite independently deserves rating as a major statute

The Labor Management [Taft Hartley] Act of 1947

1 Background

Because of its unequivocal guarantee of labor's right of self organization and of collective bargaining its tolerance of the closed shop (in which an employee must belong to a union in order to obtain a job), its outlawing of company unions, its alleged tendency to create a labor monopoly, and its lack of balance in proscribing practices as unfair when indulged in by employers but making virtually nothing unfair when done by labor organizations, the act of 1935 was from the outset vigorously criticized by industry, and as time went on by sizable sections of the press and general public as well During World War II, the matter was largely in abeyance But in 1946-47, circumstances brought it again to the fore On the one hand, employment was at a peak, unionization (greatly stimulated by the Wagner Act) had reached unprecedented levels, and labor was, or at least seemed to be riding a crest of political power, with more influence at the White House, if not also in Congress, than at any earlier day On the other hand, the country was experiencing the most formidable labor-management troubles in a generation, with the act of 1935 and its administration by the National Labor Relations Board be-

lieved (rightly or wrongly) to be at least partially responsible, or at any rate to have been proved lacking in preventives and remedies Honest labor had, perhaps, not over reached itself, few thinking people begrudged the gains in wages, hours, and the like that it had achieved But aggressive and vindictive labor leaders, conscienceless agitators, and emboldened racketeers were bringing deep discredit upon it—flouting the law, forcing half-willing groups of workers into actions injurious to labor, management, and the public alike, and inflicting serious wrongs, especially on the millions of workers choosing to remain outside of unions With conviction already widespread that something ' would have to be done about labor," the elections of 1946 sent to Washington a Republican House and Senate prepared, and indeed eager, to carry out what they construed as a popular mandate

2 Enactment

Probably some labor legislation would have been enacted in any event, large numbers of Democrats would have favored it, and the liquidation of war situations might have required it With a Republican Congress in action, however, such legislation was inevitable, and the first six or seven months of the new Eightieth Congress saw a number of bills amending the National Labor Relations Act prepared and introduced and much discussion of the subject carried on, both in Congress and outside, until finally a measure emerged—sponsored by the chairmen of the labor committees of the two houses, Senator Robert A Taft of Ohio and Representative Fred A Hartley of New Jersey —on which, after conference committees had ironed out important differences, the two branches were able to agree In June, 1947, the Taft Hartley bill passed the lower house by a vote of 320 to 79 and the upper by 68 to 24, and after President Truman had vetoed it as a ' bad bill—bad for labor, bad for management, and bad for the country,' the houses repassed it by majorities requisite to make it law—331 to 83 and 68 to 25, respectively [16] Seldom has feeling on proposed legislation—pro and con, inside and outside of Congress —run as high as when the bill was pending, seldom has a piece of legislation once on the statute book, evoked warmer attack and defense [17] It became one of the central issues of the campaigns of 1948 and of 1950

3 Principal features

Although really somewhat broader, the Taft-Hartley Act is by title a *labor management relations* act, at some points merely amending provisions of the act of 1935, at others sharply reversing them, and at still others breaking entirely new ground An outline of its principal features will serve also as a synopsis of the existing law on the various matters covered

(a) Rights and duties of unions

The general principle of unionized labor is accepted as axiomatic At the same time, the right of every worker to "refrain from concerted activities," *i e*, to identify himself with no union, if he so prefers, is expressly recognized and protected Every union desiring to be in a position to avail itself of the services of the Labor Relations Board in defense of its bargaining and other interests is required to keep on file with that agency full information on its membership, officers, finances, rules, and regulations

[16] 61 *U S Stat at Large* 136

[17] The Republicans were primarily responsible for the legislation s enactment yet on final passage 20 Democrats voted for it (22 against it) in the Senate and 106 (71 against) in the House

When the act was passed, 30 per cent of all organized employees (notably in the printing industry and the building trades) worked under closed shop, i e in establishments in which one must be a union member even to be hired, and more than that proportion were under 'union shop" rules requiring every worker in an establishment to become a union member, if not already such within 30 days after taking employment Under the Taft Hartley Law, the closed shop is completely banned, and 'union shop' may be maintained only if a majority of all workers in an appropriate bargaining unit eligible to vote on the question so demand

(b) Closed and "union shops

The basic rights and procedures of collective bargaining as guaranteed in the legislation of 1935 are reaffirmed, with full freedom for both employers and employees to choose the agents who will represent them at the bargaining table But whereas previously only employers were compelled to bargain, *employees now are equally forbidden to refuse to do so, and whereas formerly* employers might not, in the course of bargaining or otherwise, make even non-coercive statements to their employees or others without risk of having what they said adduced as evidence of unfair practice, now they may do this with impunity A ban on 'industry-wide bargaining *i e* bargaining on the basis of an industry (like coal-mining) as a whole, was voted by the House but deleted in the Senate Notwithstanding however, that, three months before the act was passed one of the most bitterly contested disputes in recent labor management relations history was supposedly settled when the Supreme Court in effect ruled that unions of foremen and supervisors, linked up in a Foreman's Association of America were covered by the act of 1935 and that employers must bargain with them on that basis, the new law denies such unions (as being managerial rather than labor) any bargaining rights

(c) Collective bargaining

To correct the inequality of labor organization and employer responsibility inherent in the Wagner Act—which, as observed, took note of unfair practices of employers only—the new law also bans six unfair practices sometimes engaged in by employees Thus employees may not be coerced to join unions, members in a union shop may not be required to pay excessive initiation fees or dues, employers may not under the practice popularly known as feather bedding,' be required to pay for services not rendered, *e g*, to pay a textile worker for operating a single machine when he could just as well operate four or five, or, in the case of a radio station using records, to hire 'live' musicians, and secondary boycotts (in which one party refuses to deal with another unless the other will, in turn, refuse to deal with a third) and jurisdictional strikes (arising, for instance out of conflicts between A F L and C I O unions) are forbidden For any of these practices, unions are now liable to suit

(d) Unfair practices

Naturally, the law has a good deal to say about strikes and other coercive labor practices In general, the right to strike when other measures fail is fully recognized Certain kinds of strikes, however, *i e*, jurisdictional strikes (just mentioned) and strikes against the federal government (for which the penalty is instant dismissal) are absolutely prohibited, and for situations threatening legitimate strikes, procedures are ordained in connection with the new Federal Mediation and Conciliation Service designed to give the parties

(e) Strikes

a chance to "cool off' and mediation an opportunity to achieve its purpose before overt action occurs The National Labor Relations Board (never employers, at least acting directly) may seek injunctions against certain unfair labor practices, and the president against strikes endangering national health or safety

**(f) Political provisions**

There also are provisions of political import Benefit of National Labor Board procedures *e g* hearing and deciding complaints against employers, can be claimed by no union having any officer refusing to declare under oath that he is not a member of the Communist party, and that he does not favor the forceful or unconstitutional overthrow of the government When challenged, too this provision was upheld by the Supreme Court [18] And the Federal Corrupt Practices Act of 1925 is amended to bracket labor unions with corporations by forbidding them—not *individuals* but *organizations*—to make any contributions or incur any exenditures from union funds in connection with any election (construed to include primaries, caucuses, and conventions) to any federal political office No feature of the law stirred warmer labor resentment than the latter, even though means of effectively circumventing it were speedily found through auxiliary organizations like C I O 's Political Action Committee, and in 1948 the Supreme Court pronounced it unconstitutional as violating freedom of speech [19]

**(g) Administrative arrangements**

Finally, the National Labor Relations Board remains, with membership increased from three to five, and with supervising bargaining and repressing unfair practices still its main fields of activity To meet the criticism, however, that formerly the Board was at the same time "investigator, prosecutor, judge, and jury," the agency is now turned into a purely quasi judicial body, a 'labor court, with all work of investigation and prosecution devolved upon a new official, the 'general counsel," appointed by the president and Senate for four years, and with full supervision over 20 regional offices and their field staffs [20]

**Repeal or revision?**

During the first three or four years of the law's operation, deep seated differences of view persisted Friends of the legislation pointed to a decrease in the number of strikes, opponents denied that there had been much decrease, and in any event that Taft Hartley was responsible Management insisted that opinion polls revealed workers individually to be largely favorable, with opposition whipped up mainly by union leaders and politicians, labor spokesmen scoffed at this contention The elections of 1948 saw the Democrats taking a clear stand for repeal and attracting enough labor support to clinch the victory of President Truman, and the Eighty first Congress, with Democratic majorities in both houses, entered upon its work in January, 1949, with Taft Hartley repeal high on its agenda An administration plan first to repeal the new law, then to reenact the Wagner Law, and afterwards to amend the re

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stored measure—or, as an alternative, to wrap the three objectives in "one package" and accomplish the entire purpose by a single statute—eventuated in a number of highly divergent bills which during the first half of 1949 received protracted congressional and popular attention Against a growing undercurrent of opinion, however, that at most the Taft-Hartley Act needed only to be revised, divided House and Senate majorities could make no headway, and long before the session closed, repeal was for the time given up—not abandoned, but earmarked as an issue to be taken to the voters in the congressional elections of 1950 By the time when those elections came around, however, other issues in most states had priority, and, with Senator Taft himself prepared to sponsor amending legislation, neither the congressional nor the national situation has since been favorable for action—although, significantly, the session of 1951 saw three minor changes fully agreed upon by leaders of both parties and by representatives of both the A F L and the C I O enacted and signed by the President Previously, organized labor had been insistent upon total repeal and adamant against any piece-meal revision

In the last 100 years, our American economy has developed in a fashion to make of us a nation of employees, four out of every five gainfully employed persons in the country today are wage-earners Confronted by this situation, and by the largest and potentially strongest labor movement that the world ever has seen, the United States will increasingly stand in need of a well-considered basic labor policy favorable to the operation of a free economic system in the framework of a democratic society Whether the Taft-Hartley legislation fused with the Wagner Act, and conceded by its friends to be subject to corrective revision, has supplied the formula for such a policy, the future must decide

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# CHAPTER 30

## The Welfare Function—Social Security
## Government and Welfare

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*Standards of living*

*An ideal society would be one in which every individual had enough to* eat and wear, adequate shelter, protection for health and safety, a chance for a good education, and in the case of adults an opportunity to earn a living by moderate toil, with safeguards against worry and want in old age Such a society never existed, and certainly most peoples of the earth today fall very far short of anything of the kind Even in the United States, with its vaunted "high standard of living" the picture is marred by poverty, illiteracy, preventable disease, slums, social discriminations and tensions, and various forms of personal insecurity Probably nowhere else, however, has the ideal been approached as closely as here, and reasons can be found in (1) the hardy, ambitious, and industrious stocks from which most of our people have sprung, (2) the almost limitless opportunities for livelihood and comfort afforded by a virgin country of great size and rich resources, (3) the scope for enterprise and advancement permitted by our political and economic system, (4) the high degree in which inventions have found practical applications in the daily life of our people, alleviating drudgery and adding to the conveniences, satisfactions, and rewards of existence, and by no means least (5) the steadily increasing activities of government on all levels in behalf of the public well-being

*Some terms distinguished*

When the federal constitution's framers asserted in the document's preamble that one of the purposes in view was to "promote the general welfare," and later authorized Congress to "provide for the general welfare of the United States," they were using the term "welfare" broadly to include any sort of advantage or benefit for the country as a whole, even such general blessings as national security and prosperity Within their spheres, state constitutions often employ the term similarly And from this viewpoint, everything that any of our governments does is, of course, supposed to contribute to "welfare" Later usage, however, has developed, in addition, a more specialized concept and phrase, i e , "social welfare," denoting more particu- [illegible]

vantage and disaster have arisen—the still further refinement of "social se-

curity," centered in economic protections against, or for minimizing the effects of, hazards like unemployment and old age. Social security is a phase of social welfare, and social welfare a phase of general welfare. But the rather loose distinctions indicated may usefully be borne in mind as we turn to government's promotion of (1) certain forms of social welfare and (2) social security.

**Earlier state and local welfare activities**

The earliest social welfare activity on record was care of the poor. In England this responsibility, in so far as not discharged by relatives or other private benefactors, early fell to the church parish. Even before the American colonies were founded, however, parliamentary legislation authorized taxation for the purpose, with the parish continuing as the administrative unit, and the colonies inherited the concept of poor relief as a public, tax supported function. In New England and some of the middle colonies, the town became the relief agency, farther south, the parish—soon replaced, however, by the *county, and to this day, towns and counties throughout the country raise* and spend much revenue for this purpose.

More than 100 years ago, the states also entered the field—establishing hospitals and asylums for special classes of unfortunates, such as the feeble minded, the insane, and the blind, setting up boards and other authorities to administer such institutions, in some instances organizing departments of welfare, and more or less actively supervising local services, encouraging expansion of their scope and raising of their standards. Much was done haphazardly, and in times of stress services sometimes proved pitifully inadequate. On the other hand, deficiencies were to some extent met by the private charities for which our people have traditionally had a commendable record. And early in the present century states began helping their local governments extend financial aid to persons outside of institutions, chiefly the aged, the blind, and needy mothers. Meanwhile, too, states and localities were developing health services, introducing safety requirements in transportation and industry, building up educational systems, regulating working conditions for women and children, fixing maximum hours and minimum wages in industry, enacting workmen's compensation laws, and encouraging good housing.

**Growth of federal responsibility**

Until well within the present century, the federal government kept almost entirely out of the social field. Under the commerce clause, and especially under the grant of power to raise money for promoting the general welfare, there was no deficiency of authority to act. But "social work" was considered properly the province of states, localities, and private agencies, and until relatively late federal action hardly extended beyond such more or less scattered forms as abolishing slavery, humanizing the conditions attending immigration, curbing the transmission of diseases and the distribution of impure food and drugs, instituting a supervisory health service, and imposing safety regulations upon railroads, water carriers, and mines. Even the first three decades of the present century brought little that was new except creation of a modest children's bureau and small grants to the states for combating venereal diseases, encouraging vocational rehabilitation, and promoting the well being of mothers and infants.

Then, however, came a profound change During a couple of generations, the American economy had been nationalized, all parts of the country had become newly interdependent, goods flowed and people moved in heavy volume and over long distances, agriculture, labor, and business had seen state encouragement and regulation give way extensively to federal, educational backwardness, low health standards, poor housing and economic dependency in one section *had come to be of concern to all And just as these* arguments for a nationalized social, as well as economic, order were impressing themselves upon thinking people, the country slipped into the deep depression of the thirties, revealing weaknesses only half suspected and driving the federal government to courses of action never before contemplated Social welfare at last, and speedily, became a primary national concern, and such it remains Federal, state, and local responsibilities continue intertwined But in its larger aspects the welfare system we now have is nationally planned, nationally supervised, and to a considerable extent nationally financed The "welfare state at which we seem to have arrived is in the main a *national* state

## PUBLIC HEALTH

The Public Health Service

One of the principal sources not only of individual distress but of social waste is ill health, losses from it, merely in terms of dollars, amount to millions a year Throughout our history, public responsibility for protecting the health of the people and caring for the sick has rested mainly upon the states and localities, and so it still does, notwithstanding significant present federal activities and warmly supported proposals for expanding them Traditionally, federal health interests have been slanted in the direction of the armed forces, and not only has each of the three armed services long had its own medical establishment under a surgeon general, but the present federal health agency, the Public Health Service—starting as early as 1798 as an instrumentality for supervising hospitals for American seamen—is manned in the upper levels by a surgeon general and other officials drawn in all instances from corps of medical officers enrolled for service in time of war or other emergency Located since 1939, in the Federal Security Agency, the Public Health Service now has as principal functions

1 Hospital service and direct medical care for large numbers of federal employees outside of the armed services
2 Assistance to other federal agencies in health and medical programs for their employees and beneficiaries
3 Prevention of the spread of communicable diseases into and through the United States
4 Administering grants in aid to states for public health services and for supplementing and strengthening such services
5 Conducting scientific research (notably today on cortisone, ACTH and related compounds and on radio active isotopes) through a series of medical institutes and disseminating its results
6 In general, protecting and improving the health of the people "

Cognate, but separate, is a Food and Drug Administration, also in the Federal Security Agency, and charged with protecting health by prescribing and enforcing standards of purity for foods, drugs, and cosmetics sold to the general public

*Federal aid*

The basic principle in the entire public health field is federal state cooperation, one of the four divisions of the Public Health Service is a bureau of state services, and among this bureau's significant functions is administering federal grants in aid Of late, the total of such grants has been in the neighborhood of $160 million a year, allocated most heavily to construction of hospitals and provision of research facilities, but in part also to training health personnel and to advancing particular medical programs having to do with mental health, cancer, tuberculosis, venereal diseases, and general health In some instances grants must be matched by participating states, in others not, and the basis of allotment may be population, financial need, or degree of prevalence of a particular disease All states now are receiving grants, and the Public Health Service intends to expand such cooperation as rapidly as funds permit

*Proposed national health insurance*

When the Social Security Act of 1935 became law, many people were disappointed because it did not provide for nationwide, federally-aided health insurance, and after a committee appointed by President Franklin D Roosevelt submitted reports in 1938 proposing a 10-year program of the kind, a bill appeared in Congress authorizing federal appropriations rising eventually to $425 million a year (to be matched dollar for dollar by participating states), for use mainly in setting up and maintaining general health-insurance systems Combined with considerable reaction in conservative circles against New Deal regulation and spending, powerful opposition from the American Medical Association other medical groups, and industrial insurance companies prevented action both on this project and on a more limited one of Senator Robert A Taft costing little ... such legislat... one ma ...

The is[illegible], of course, is between ... proposal on the subject will prevail ... (1) present more or less haphazard arrangements for health *assistance* for people unable to pay for it and (2) a scheme of all round compulsory *insurance* under which, in return for paying premiums through some form of taxation, all persons would be entitled to medical, dental, and hospital services at public expense Opponents of insurance denounce it (1) as "socialistic," (2) as menacing medical standards by converting 'free enterprise' doctors and dentists into mere civil servants performing routine duties, (3) as destructive of the traditional patient family physician relationship, and (4) as suffused with possibilities of fraud, waste, and bureaucratic abuse And both they and people on the other side find plenty of argument in the experience of Great Britain, where a scheme of the kind is in full operation

## EDUCATION

*Miscellaneous federal activities*

None of the social activities here reviewed started on a more purely local basis than education, and predisposition in favor of local control still is strong As in other fields, however, emerging social and economic conditions inexorably required that responsibilities be assumed on higher levels—first the county, afterwards the state, and eventually, within limits, the nation As would be surmised (under our constitutional arrangements), the federal government's approach to the field was by way of grants to the states, and the principal proposal today for enlarging its contact contemplates the same technique Aside from setting up a United States Office of Education in 1867 for collecting and disseminating educational information, and establishing special institutions like Indian schools and colleges, the United States Military and Naval Academies, and Howard University for Negroes, federal efforts long took the form almost exclusively of

1 Allotments of public land to incoming states for school purposes
2 Land grants to the states for agricultural education under the Morrill Act of 1862 and its amendments
3 Matched grants for education in agriculture and home economics under a Smith Hughes Act of 1917 and in a wide variety of other vocational subjects under

)43, for vocational
ative employment

Services in the past 20 years have grown still more varied A school-lunch program instituted during the thirties and continued by legislation of 1946 is relevant as a means of promoting the health and efficiency of school children Under the Servicemen's Readjustment Act of 1944, popularly known as the "G I Bill of Rights," multiplied thousands of honorably discharged veterans of World War II for a number of years thronged the nation's colleges, universities, and vocational schools, pursuing interrupted educational programs or even starting new ones, with the cost of tuition, textbooks, supplies, and support borne from the federal treasury Educational institutions, too, have been drawn farther into the federal orbit by research projects contracted for, or at least financially aided, by agencies like the Department of Defense

*Proposed general program of federal aid*

In the main, the United States is a well favored country, with resources and wealth widely distributed There are, however, especially in the South, states which fall below the average in economic well being—far below wealthy members of the Union like New York, Pennsylvania, and California Where the tax flow is heavy, a state can provide good elementary and secondary schools out of only a relatively small fraction of its income, where taxes yield less, it must dip more deeply, and where, because of deficient wealth, tax yields are really low, an even larger share still may mean only short school terms, inferior teachers, and poor equipment

Realization of this wide disparity and of its unhappy consequences, not only for less favored states but for the over all position of national intelligence,

training, and efficiency has led to strong demand for a country-wide leveling up of educational standards and opportunities, manifestly attainable, however, only through a general system of federal grants-in aid enabling poorer states to train and pay teachers and provide equipment on a scale comparable to that prevailing in more favored ones As long ago as 1938, an Advisory Committee on Education appointed by President Franklin D Roosevelt reported unequivocally for such a plan The National Education Association and many other teachers organizations, along with organized labor, have lent full support and Congress has been flooded with bills, with hearings held and favorable committee reports submitted In 1948, and again in 1949, the Senate passed a bipartisan measure bestowing educational aids estimated at $300 million during the first year, and apportioned according to need, but with no action taken in the other branch And in state-of-the-union messages of 1949 and 1950, President Truman called urgently for "prompt federal financial aid to the states to help them operate and maintain their school systems"—although again without results Obstacles include

1 Apprehension lest federal support turn out to mean federal domination
2 Doubts about whether an equitable pattern could be devised for states of widely differing needs
3 Anxiety lest the distribution of funds become entangled with discriminations on grounds of race or color
4 Notably of late, complications arising out of the thorny question of whether any plan adopted should be made to apply to parochial as well as to public schools and whether doing this would violate our time honored principle of separation of church and state [1]

Eventually, some program probably will prevail, but as yet the situation can be described only as one of stalemate

## HOUSING

Early state and local regulation

The acute housing shortage experienced by the country during and after World War II focused attention upon a problem really as old as our present industrial society Rural housing often is far from what it should be But when our population dwelt almost entirely on farms or in villages and small towns, people commonly had reasonably good homes and there was not much for public authorities to do about the matter With the rise of vast industrial centers, however, the situation changed, and decidedly for the worse Detached houses gave way to drab tenements, mounting land values led to crowding and congestion, high rents forced families into pitifully inadequate quarters, immigrant workers congregated in teeming "Little Italy's" and the like, the 'slum'—dreary, crowded, and dangerous alike to health and morals—became a blot upon an otherwise fair social economy Aside from some control over fire hazards and construction methods, the first serious attention given

[1] The Senate bill of 1949 proposed to permit each state to decide for itself whether to allocate any part of federal aid to parochial and other private schools A simultaneous House Committee bill proposed restricting such aid to tax supported schools—a plan which the National Education Association in 1951 endorsed

to housing by public authorities was directed to ameliorating the condition of low-income groups in slum areas, and while even in the third quarter of the *nineteenth century a few cities enacted local* codes prescribing building regulations and sanitary standards, the effects were slight, and in time reformers turned with more hope to the legislatures of the states From this source, in certain of the more highly industrialized sections, did indeed come measures fix ing standards with somewhat beneficial effect At best, however, except in New York, they merely imposed regulations on private owners of existing housing or upon private construction without directly bringing new and better housing into existence

The federal government enters the field

Aside from some provision for housing war workers during World War I, the federal government kept almost entirely out of the field until the depression of the thirties Since then, however it has been involved steadily, and in ways so complicated, and so frequently changed as to perplex almost any one except a professional student of the subject The matter, however, may perhaps be *simplified by observing (1) that in general the federal role always has been financial—making loans or guaranteeing them and in a few instances directly* spending money—and (2) that, also in general objectives have been either (a) to help hard pressed home owners save their homes, or (b) to encourage people to buy, build or improve homes, or (c) to promote public building of homes to be rented to low income families, or (d) to develop homes for workers near newly established or greatly expanded defense facilities

1 Loans for saving homes

The first move of all, undertaken at a time when many families were losing their homes through mortgage foreclosures, took the form of setting up in 1932 (in the depth of the depression) a series of home loan banks (under a Federal Home Loan Bank Administration) to provide credit for local institutions engaged in home financing, with in addition, a Home Owners' Loan Corporation (in 1933) to make direct long term mortgage loans, out of fed*eral funds and at low interest rates* to distressed home-owners who for one reason or another could not borrow through other channels Under a Home Loan Bank Board 11 home loan banks in scattered cities still operate actively, not loaning to individuals directly, but furnishing building and loan associations and similar institutions with credit on which home owners or home builders may draw After serving its emergency purpose by furnishing $3 billion of credit to more than a million borrowers, and doubtless keeping the great majority from being dispossessed, the Home Owners' Loan Corporation stopped lending in 1936 Collecting on past loans and renting or selling fore*closed properties, however, still give it something to do*

2 Loans promoting private housing

In 1934, the government advanced to the policy of encouraging private home building and renovation, which became and remains its most important housing objective From the outset, the agency chiefly employed has been a Federal Housing Administration, which neither builds houses nor makes loans, but through offices scattered over the country insures banks and other lending institutions against possible losses on mortgages accepted by them on one- to four family homes and covering costs of either building or renovation Large numbers of families in most parts of the land now are occupying homes which

they would not have acquired, or more modern ones than they would have enjoyed, except for loans made possible by F H A

ı Provi ions for public housing

Discovering that the foregoing services were not meeting the needs of low income families unable to build, even with assistance, the government, in an act of 1937, took the next logical step by entering the field of public housing *i e* housing provided through municipal or other local authorities with federal backing, often after clearance of slum areas, and merely rented to tenants Originally under a United States Housing Authority, the enterprise has since 1947 been administered by a new government corporation, the Public Housing Administration, and in 1949 this agency's activities (to that time not particularly impressive except in connection with war-worker housing) were sharply expanded by a National Housing Act, passed after long delay and much controversy and projecting a plan for 810,000 new housing units (separate houses or small apartments) over a period of six years As the scheme operates, projects are developed, owned and managed by public "housing authorities" (usually municipal) established under state statutes and financed by sales of federally guaranteed, tax-free bonds to private investors, although a direct federal subsidy to a maximum of $100 million a year for five years is authorized for helping make up the difference between "economic rents" (based on annual operating costs and debt service) and the rents which low-income families can afford to pay, estimated at $30 a month Although vigorously opposed by real estate interests, the undertaking, now actively in progress, considerably brightens an over-all national housing picture still leaving a good deal to be desired [2] This program was supplemented in 1951 by a Defense Housing and Community Facilities and Services Act which extends federal support for both private and public housing in certain defense areas to be designated by the president

## AIDS FOR VETERANS

Inheriting the practice from English and colonial usage, Congress not only has provided regular pay for soldiers and sailors, but has bestowed land, money pensions, civil service preferences, or other special benefits upon the demobilized forces after every war in which the United States has engaged from the Revolution onwards The particularly hazardous nature of the service rendered the country by those who bear arms in its defense has seemed to merit such recognition, persons actually incapacitated, together with their dependents, have been conceded to have an indisputable claim to the nation's care, and powerful political pressure brought to bear upon congressmen by veterans' organizations often has led to grants where the obligation was considerably less clear So generous, indeed, has been Congress when veterans have been involved that between 1792 and 1930 national outlays on money pensions alone, regardless of land allotments in earlier days and of later heavy costs of hospitalization and medical treatment, reached a total of

[2] For further encouragement of new building the act of 1949 provided $1 billion in federal loans and half that amount in grants to assist local governments in acquiring slum sites and preparing them for redevelopment

$15 billion. Benefits bestowed on veterans of World War II—in addition to the operation of regular pension, rehabilitation, and hospitalization systems, and in recognition of the heavy differential between the relatively low pay of men and women in service and the incomes generally enjoyed by people at home during years of wartime prosperity—have included government aid in carrying protection originating in in-service war-risk insurance, opportunity to acquire on favorable terms surplus war property disposed of by the federal government, increased preferential eligibility for employment in the federal civil service, monthly payments over a period after honorable discharge, and, in 1946, terminal leave pay for all wartime furlough periods not actually used—not to mention also generous provisions of the "G.I. Bill of Rights" of 1944 for grants to veterans in aid of education or training, and for government guaranty of loans procured for the purchase of homes, farms, or business.[3]

## FROM RELIEF TO SOCIAL SECURITY, 1929-35

*The shock of depression*

During the lush decade of the twenties, local, state and federal welfare activities expanded only slowly and chiefly along conventional lines. Quick descent into depression, however, brought the country a rude awakening and started it on a new and vastly bolder course. In a matter of months, millions of workers—eventually 10 or 12 millions—were thrown out of employment, and with the bulk of them habitually living on so narrow an economic margin that once out of work, they almost immediately were in want, social distress became widespread and acute. To be sure, unemployment on some scale was nothing new. But not much had been done about it. Not a state had as yet set up any system of unemployment insurance (although Wisconsin did so early in 1932). More than half of the number had introduced some scheme of old age pensions, but usually inadequate, and elsewhere the dependent aged were left to be cared for entirely by their relatives or, in default of that, to become public charges in county or other institutions. Aid to mothers, such as it was, had been cut off, and large numbers of dependent and helpless children were receiving only such more or less casual care as local agencies provided.

Moreover, the longer-term outlook was disturbing. Studies by competent authorities showed that, with population growing, the number of available industrial jobs had been declining even before the depression; that, while technological discoveries and inventions opened new avenues of opportunity, they also closed many; that the shifting of once self-sufficient country people to the cities tended to leave them dependent upon industrial ups and downs and in a generally insecure position; that, judging by all experience, periods of prosperity would continue to be followed by periods of recession and

[3] For purposes of more unified and effective administration, a Bureau of Pensions long ... n 1930 consol dated by execut ve order with ... n an ... came ... one

adversity, that with life expectancy rising [4] and the birth rate declining, persons over 60 years of age (many of them with no accumulated savings) would in future constitute a greatly increased proportion of the country's population —one in every eight it was predicted, by 1980 [5] Unemployment it appeared, would be permanent and occasionally heavy, the burden of caring for the needy aged would steadily mount, and unless strong measures were taken, the multiplying under privileged of poorer parts of the country and of congested cities would continue to detract from our boasted national standard of living In short anxious stock taking revealed the nation's problem as vastly more than merely one of tiding people over the existing period of calamity

Quest for a remedy

To 1934 35, thought and effort were centered upon getting a baffled and discouraged people back on its feet The huge federal outlays required, could not however go on indefinitely, even though the conditions now demanding them very well might recur Moreover, there ought to be ways not only of cushioning the impact of 'hard times" when encountered, but of giving great numbers of people a new sense of security against hazards of both bad times and good Interest in high places where policy is made accordingly turned to tapering off the federal government's spending activities and devising ways by which the states, brought back into the center of the social welfare picture, might, with modest federal support, and largely through forms of social insurance, achieve for their people, especially workers, a new level of security and good living

The Social Security Act (1935)

Federal spending on employment-making public works and on other forms of relief went on to some extent until after the economic situation was sharply reversed by the defense and war effort starting in 1940 But meanwhile, in 1935—after careful studies of the social insurance systems of Europe and of a permanent program for this country—Congress, by heavy majorities, passed an omnibus Social Security Act [6] representing the first concerted nation wide attack by all levels of government on the problem of economic security of wage earners and their families Conceding that the measure as placed on the statute-book did not provide complete protection against 'the hazards and vicissitudes of life," President Roosevelt, its principal author and sponsor, nevertheless characterized it as 'the most useful and fundamental single piece of legislation ever enacted in the interest of the American wage earner" After certain later extensions of coverage (most recently in 1950), in terms both of numbers and classes of beneficiaries and of kinds and amounts of protection afforded, the system for which the legislation provides still is less comprehensive than many people would like Even as now operating, however, it furnishes truly impressive testimony to the accepted responsibility of government on every level for assuring all people in all parts of the country a reasonable degree of economic and social well being

[4] In 1900 it was 49 years in 1950 67 years
[5] As pointed out below this forecast now has been sharply revised upward
[6] 49 *U S Stat at Large* 620

## I THE SOCIAL SECURITY SYSTEM

*General features*

With considerable unity imparted by the act of 1935 and later amendments, the social security system of today nevertheless, is a composite of several different programs, not quite all of which (for example, vocational rehabilitation) are embraced in the basic legislation [7] An over all tabulation, however, even confined to that legislation would look somewhat as follows

A *Social insurance*
 (1) Unemployment insurance
 (2) Old age and survivors insurance
B Federal state public assistance
 (1) Old age assistance
 (2) Aid to the blind
 (3) Aid to dependent children
 (4) Aid to the totally and permanently disabled
C Welfare and health services
 (1) Maternal and child health services
 (2) Services for crippled children
 (3) Child welfare services

Of these various programs only one i e old age and survivors insurance is wholly federal, all others are administered by the states, or by states and localities, under state enacted laws meeting federal requirements Except, too, for costs of administration borne by the federal government, the two insurance programs are financed from employer or employer employee contributions, while all others are carried on with state, or state and local funds, supplemented by federal grants in aid Built up and operated (except for old age and survivors insurance) on the basis of state law, with merely federal stimulus and assistance, the system keeps well within the bounds of our national traditions

*Social insurance*
*1 Unemployment compensation*

Towering above all else in the general scheme are the two plans of *insurance*, unemployment and old age and survivors With a view to softening the effects of unemployment for the great mass of wage earners, the states are encouraged, by federal grants designed to cover administrative expenses, to set up insurance or compensation systems under which workers involuntarily unemployed become entitled to limited benefits for restricted periods paid through public employment offices or other federally approved agencies and derived from a 3 per cent payroll tax on employers of some specified *number of persons—most commonly eight* but in some states fewer [8] Speak-

[7] Security problems of railway workers have been handled by Congress quite separately A railroad retirement or pension law of 1934 was invalidated by the Supreme Court but a somewhat different measure of 1937 became operative without judicial objection In 1939 a scheme

ing strictly, there is no *federal* system of unemployment insurance Congress merely has utilized its taxing and appropriating powers to stimulate the states to devise and set up insurance systems of their own, and while various prescribed conditions must be met if federal grants to cover costs of administration are to be forthcoming, each state is left free to adopt any general type or plan of insurance preferred (or none), and, in so doing, to determine the classes of unemployed and the conditions under which each class may participate as well as the scale of benefits to be paid[9] Nowhere has it been found feasible to make an unemployment insurance scheme cover all of the gainfully employed, and although the total covered in 1951 exceeded 34 million the system in general does not extend to self-employed persons, agricultural workers, domestic servants, public employees, casual laborers, or employees of non profit agencies and institutions

Every state has been participating since 1937, and, apart from the large number of workers not covered, some shortcomings in administration, and the diminished value of benefits resulting from inflated living costs, results, within the limitations of the plan have been generally good In a prolonged depression period of mass unemployment, reserve funds, although, under favorable labor conditions, mounting to $7 8 billion by 1951, sooner or later would be exhausted leaving no alternative to relief and public works on the pattern of the thirties

2 Old age and survivors insurance

(a) Essence of the plan

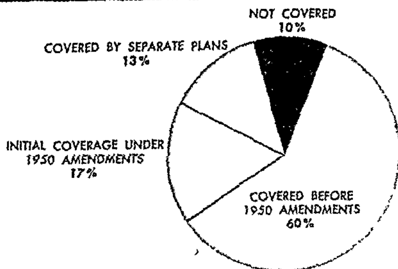
The problem of the aged presents itself in two major aspects (1) that of relieving aged persons who already dependent, cannot be, or in any case are not, cared for adequately by relatives, and (2) that of preventing people not yet old from becoming public charges later on The Social Security Act of 1935 dealt with both phases, the first as a matter of old age *assistance*, the second as one of old age *insurance* With attention at the moment centered on insurance, the second may be commented upon first In essence, old age (since 1939 old-age and survivors) insurance is a nation-wide contributory retirement system under which annuities or pensions, graduated in amount on the basis of earnings and duration of employment, are payable at the age of 65 from a fund built up from money paid in as premiums (technically taxes) equally by employees and their employers The national government makes no financial contribution beyond meeting the costs of administration, but bears undivided responsibility for operating the system and plays the combined rôles of collector, bookkeeper, and manager, the states and their subdivisions have no part in the undertaking On the employee's side, the plan is one for compulsory savings—in other words, for spreading wages over his adult life time rather than over merely his wage earning years, so that after retirement he may have a resource on which to draw for a living And on the theory that the employer (not to mention the tax paying public) has a stake in fostering employee frugality and in keeping his employees from eventually going on relief, he is required to give his workers, in effect, a premium for their industry, and in so doing to help make the plan workable, as a scheme

[9] Commonly running from $20 to $25 a week, for from 16 to 20 weeks.

of "coöperative thrift," by sharing in creating and maintaining the fund Under the system, almost three million retired workers already are drawing benefits, while several times as many still on the job are building up potential rights to future old-age income

(b) Coverage

At the outset, old-age insurance applied to substantially the same workers as unemployment insurance, with approximately the same groups, e g, agricultural workers and domestic employees, excluded Whereas, however, the coverage of unemployment insurance never has been expanded on any large scale, that of old age insurance has been greatly broadened In 1939, 1 5 million workers not previously covered were brought in, the name was changed to "old age and survivors insurance, and the scope was further widened to include protection not only for the worker but for his family, through provision for monthly benefits for aged wives and young children of retired workers, and for widows, orphans, and aged parents of workers dying before retirement And after prolonged agitation, an amending act of 1950 brought under the system, in addition, 4 6 million self-employed non-farm workers, 1 6 million employees of state and local governments and 200,000 federal workers not covered by the federal civil service retirement system, 600 000 employees of non profit institutions a million household servants, some 850 000 farm workers, and several smaller groups—an aggregate of almost 10 million—raising the total covered (not counting, additional members



of families) to approximately 45 7 million, or substantially three-quarters of the country's entire labor force [10]

(c) Financing

Contributions made by employees and employers alike started at one per cent of the wages received or paid in 1937, and under the original law would by stages, have reached a maximum of 3 per cent in 1949 Because, however, this promised to build up huge reserves long before they would be needed, Congress, from year to year, and usually over presidential objection, 'froze' the tax at 1 per cent, doing this most recently in 1947 for the period through 1949 although at the same time specifying that in 1950 the levy should rise to 1 5 per cent and in 1952 to 2 per cent A new time table, however was introduced by the legislation of 1950, and as the matter now stands the rate will not rise to 2 per cent until 1954, but to 2 5 per cent in 1960, 3 per cent in 1965, and 3 25 per cent in 1970 The maximum yearly contribution of a worker today (on maximum wages of $3,600), and of an employer in his behalf, at the prevailing rate of 1 5 per cent, is $54 [11]

(d) Benefits

The formulae by which the sums accruing to beneficiaries are calculated are far too numerous and complex to be indicated here Suffice it to say (1) that before the legislation of 1950 the monthly average for a retired worker was $26 80 for men and $20 80 for women, for a retired worker and his wife $41 90, for a widow $20 90, and for a widowed mother and one child $36 70, and (2) that the general purport of the 1950 act is to increase the benefits of workers already retired by 77½ per cent and of those due to receive benefits in the future by approximately 100 per cent, and to raise family benefits from the former maximum of $85 to $150 Although leaving benefits still too low for subsistence without other income—sometimes even below what can be realized from 'going on relief (that is, transferring to old age *assistance*)—these substantial increases at least partially meet an urgent demand for payments more commensurate with current inflated living costs, and they are expected to be covered as the years pass, and for growing numbers of beneficiaries by the higher tax rates progressively becoming operative The total paid out in fiscal 1951 to some 2 6 million persons has been estimated at $1 6 billion

(e) Significance

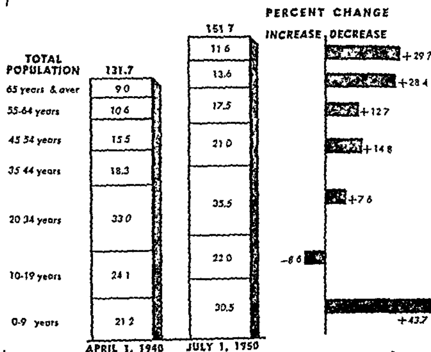
The old age insurance system described represents a stupendous public-welfare undertaking, and doubtless it will continue to expand, with more groups covered, larger funds collected, and more benefits disbursed Nor has it been built up too soon, because whereas in 1900 people of 65 and over formed less than 4 per cent of the country's population, and in 1930 only 5 4 per cent, the proportion—7 8 per cent in 1950—now is rising at an accelerating rate and by 1980, we are assured, will go as high at 13, or possibly 14, per cent [12]. Workers, and especially employers, complain of the contributions

[10] Of gainfully employed persons not yet covered 7 6 million are covered by some other

own quotas turned over to the federal treasury and absorbed into the general funds of the government although only as a trust fund loan on which interest is paid

[12] In 1950 11 6 million persons were over 65 by 1960 it is estimated the figure will be 15 million and by 1980 22 million

they are required to make, and will complain more loudly of the higher ones they will have to make in days to come Adoption and development of the system, however, merely brings us into line with advanced foreign countries; and in any case the entire economic and social condition and outlook of the United States make the scheme, although still susceptible of improvement, an elementary matter of common sense and prudence Future generations will be grateful for it [13]




Population figures are in millions

Under the two *insurance* systems described, the unemployed and the retired receive benefits, in given situations, as a matter of right and without regard to economic condition But important groups of disadvantaged persons are not reached in these ways, and for three of these—the aged imminently in want,

Federal-state public assistance

[13] Any comment on old age insurance would be incomplete without mention of (1) the

the blind, and dependent children—the l
benefit
time unable to work and lacking
othe support could do except go to the almshouse Around 1923, a few states introduced pensions designed to enable such unfortunates to eke out an existence in their own homes, and by the close of 1934, 28 of the number had legislation on the subject although in only 10 was it state-wide and in most instances the funds available for benefits were pitifully small

1 Old age as sistance

The depression of the thirties naturally aggravated the plight of large numbers of old people sweeping away savings and impairing the capacity of relatives to help, and, building upon such state systems as existed, the Social Security Act in its very first title or section, introduced a plan of national responsibility and cooperation under which assistance for the needy aged—persons for whom long-term insurance means nothing—has become numerically and financially the most important purely relief program now in operation in the country The technique employed is the familiar grant in aid, originally on a uniform 50-50 basis but now according to formulæ which for different states result in federal state ratios varying from 75-25 to 60 40 [14] The system is at present in force in all states, and in every case except one, payments start at the age of 65 Payments are due, however, only where need can be demonstrated, and standards for determining need naturally differ Moreover, the scale of payments within a state depends upon how much the state itself is willing or able to put into the undertaking and how much, on this basis, it can get from the federal government On September 1, 1951, a total of 2 7 million aged persons (nearly one fourth of all men and women in the country 65 years old or beyond) were receiving an average of $44 a month not including medical costs but with averages in particular states varying all the way from $20 49 in Alabama to $70 68 in California

2 Aid for the blind

Under the legislation of 1935, the federal state program for blind persons is broadly similar to that for the needy aged Subject to federally imposed standards, each state maintains its own system, all states except Pennsylvania, Missouri and Nevada (having their own systems) qualify for federal aid on a 50-50 basis, to be eligible for benefits, there must be demon
cluding such deficiency of eye

country's blind population) re-
ge of $47 per month not including medical costs

3 Aid for dependent children

Many dependent children still are cared for (in a fashion) in privately or publicly supported asylums, orphans' homes, and other institutions With a view, however, to salvaging the advantages of home care wherever possible, numerous states, even before 1935, enacted laws providing pensions or other forms of aid for needy mothers having children in their charge, and the Social Security Act undertook to generalize this type of beneficence by in-

[14] Naturally the beneficiary makes no contribution to the funds from which payments are made

stituting federal grants in aid for its support State-operated systems vary, but in virtually all instances assistance is available only in behalf of children *under 16 years of age (18 if in school), only if living with a parent or other* near relative in a home and only, of course, if financial need is shown All states except Nevada (which has a small separate program) receive federal subsidies (increased in 1950) for the purpose, and on September 1, 1951, aid was paid to upwards of 610,000 families in behalf of 1 6 million children The average grant per family was a little over $73 per month

**4 Aid for totally and permanently disabled**

The legislation of 1950 added a new category to the general program of public assistance the totally and permanently disabled Under conditions similar to those for the blind and aged federal aid is now available for those who are not blind and not aged but being over 18 are totally and permanently incapacitated Late in 1951, more than 110 000 persons were receiving an average of $44 per month

**5 Welfare and health services**

As observed above the Social Security Act of 1935 disappointed many *people by providing no general system of health insurance To strengthen* state health and welfare work, nevertheless, the legislation did institute three special health and welfare programs under which federal grants in aid now go to all states, the District of Columbia and four territories, not for payments to any particular persons but for the general support of appropriate state activities The sum of $15 million now is distributed annually among the states and territories for maternal and child health services, $12 (after 1951, $15) million for services for crippled children and $10 million for child-welfare services—in proportion to demonstrated need and on condition in all cases that federal requirements are met and federal funds at least partially matched

**Administration and supervision**

Except old age and survivors insurance, every form of security touched upon is a joint federal state undertaking with the national government instituting the program (perhaps on the basis of previous state activities) and *giving it financial assistance* but with responsibility for organizing it locally resting upon the states—as also for deciding whether to make it broader than the federal government has agreed to support providing facilities for administration, determining who are to receive benefits and in what amounts, and of course making requisite appropriations Before federal money for any undertaking (except old-age and survivors insurance) becomes available, a state's plans for use of the combined funds must receive the approval of some appropriate agency of the national government and as a rule that agency retains general supervision For coordinating and overseeing the system as a whole (except unemployment insurance, *supervised by the Bureau of Employment* Security in the Department of Labor), there is a Social Security Administration in the Federal Security Agency established in 1939, and naturally the supervising authorities for the various forms of security (except unemployment insurance) are units or bureaus of this Administration, chiefly those of old age and survivors insurance (with 509 field offices), public assistance (old age dependent children the blind, the disabled), and a children's bureau transferred (except for its purely labor functions) from the Department

of Labor in 1935 and overseeing the services for maternal and child health and child welfare [15]

*The system sustained by the Supreme Court (1937)*

Inevitably the Social Security Act of 1935 was attacked at many points on constitutional grounds, and amidst confusing decisions of lower courts a good deal of doubt arose as to how much of it would ultimately be sustained. In a series of notable decisions handed down on May 24, 1937,[16] however, the federal Supreme Court—although by narrow margins of five to four—took a broader and more liberal view than in earlier decisions such as those involving the N R A and the first A A A and upheld every really vital feature of the basic law discovering at last as someone has remarked, "a method for implementing nationalism. Congress said the Court in effect, not only may legislate for the general welfare but in any given situation may determine what the general welfare requires.

*Some conclusions*

The over all objective of the social security system is one concerning which reformers in all ages and countries have dreamed, *i e*, the abolition of poverty or at any rate the mitigation of its most distressing consequences. To be sure situations and conditions making for economic want cannot be legislated out of existence. There always will be unemployment. People will go on growing old and incapable of supporting themselves. Medical skill and sanitary science cannot eliminate sickness. There will forever be widows and orphans and crippled children and blind and other needy and helpless members of society. What social security seeks to do is to take the economic impact of unemployment or other affliction off the individual, at least partly, and absorb it into a collective burden to be borne by a state-wide or other community. In the case of old age and survivors insurance, it is true, the beneficiary himself carries a share of the burden as funds are built up against the day when he will need to draw upon them. In every other instance, however, assistance is non contributory, that is to say the beneficiary, being in present (or in the case of unemployment insurance at least potential) need, does not give but merely receives. Undoubtedly the system has justified itself and is here to stay. In general it has been well administered, and in the process the standards and techniques of state and local welfare management have received a wholesome toning up. There still are gaps to be filled and defects to be remedied and the question remains of whether unemployment insurance, or even the entire program should not, as some have advocated, be taken over completely by the federal government. But even within only a decade and a half multiplied millions of people have attained a basic minimum of protection which could have come to them in no other way.

[15] For several years proposals have been frequent that a Department of Welfare headed by a secretary of cabinet rank be created and in 1949 the Hoover Commission recommended such an establishment embracing both educational and security functions. In the same year President Truman urged Congress to authorize a department of the kind and meeting with no response he later sought to attain his objective through one of his many reorganization plans. Not only however, did the Senate on this occasion block the proposal but when in 1950 he tried again with a somewhat revised project (this time a Department of Health Education and Security) the House of Representatives took its turn in frustrating action. As indicated earlier (see p 318 above) a principal impediment in Congress has been apprehension lest creation of the suggested department prove a step in the direction of "socialized medicine."

[16] Carmichael *et al* v Southern Coal and Coke Co 301 U S 495 Charles C Steward Machine Co v Davis 301 U S 548 Helvering *et al* v Davis 301 U S 619

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# CHAPTER 31

## Foreign Relations—Controls and Processes

### THE GENERAL SETTING

The United States and to day s world

In all fields of activity thus far surveyed, our various governments, within their range of constitutional competence, have full scope for making and carrying out policies as they choose, at all events, no foreign government can rise across their path and by direct action block them The international field, however, is different There our government at Washington is con fronted with the fact that it is but one of 70 or more national governments on the globe, and that frequently what it can plan and do is largely conditioned by what one or more of the number (all claiming equal sovereignty) them selves do, or will agree to or permit And this restraint from interests and wills beyond our control—so real that, for example, one almost may say that the Russians have been making our foreign policy for us since 1946—is the first determining circumstance in our conduct of foreign relations A second such circumstance is that our government must operate in a greatly shrunken world Not only have all governments and peoples become far more inter-dependent economically than 100 years ago, but technology has shortened distances, multiplied points of contact, speeded up the tempo of life, and intensified sensitivity to even the remotest events and developments The world is smaller, but our government must be prepared to speak and act in every corner of it

Tensions and responsi bilities

In the third place, we live in a world suffused with tension and strife Over the years, some progress has been made toward international amenity and good living, in the words of a recent writer, international relations have to some extent been 'civilized ' Though lacking any such sanctions as national law enjoys, international law has here and there softened asperities, treaty-making has helped, international organization is trying to promote good will and cooperation By and large, however, the world in which our authorities at Washington must operate still is one governed by the standards of tooth and claw Upon this country, events have thrust leadership among nations braced to resist ideological, and perhaps physical, conquest of one half of the globe by the other half, and in this situation foreign relations becomes primarily a matter of defense and security, whether by peaceful processes or, as already in the Far East, on the field of battle For us, foreign relations *and* defense spell nothing less than chance or no chance for national survival

Finally, the United States is one of the great powers of the world, in some respects the greatest, and this places upon us a heavy burden of responsibility Many nations look to us for leadership and help, others are chilled toward us by jealousy and resentment, the Kremlin accords us distinction as being the one nation above all others to be overwhelmed before Communism covers the earth Foreign relations of such a nation, in such a world, closely rival if not outbalance domestic affairs in challenges raised, attention required, and consequences of good or bad management for the public well being

Foreign and domestic affairs intermingled

Foreign and domestic affairs, however, are not, as sometimes supposed, two separate and independent national concerns On the contrary, they are inextricably bound together, domestic affairs being commonly the fount from which foreign interests and policies spring, the matrix or mold in which they are shaped *Under our American system, the authorities chiefly charged with* determining and carrying out foreign policies—the president and Congress—are the same as those sharing major responsibility for affairs at home, and when, for example, they decide to restrict immigration or to raise or lower duties on imported goods or to insist upon equality of commercial opportunity in a foreign country, they are actuated primarily, not by isolated or theoretical considerations, but by the needs and interests of our economy at home Even when, a decade ago, they embarked upon the hazardous policy of helping Britain and China withstand the assaults of totalitarian powers, and eventually led us into war in the common cause, their basic objective was to protect our freedom, institutions, and manner of life within our own borders Such is the great purpose, too, of our topmost foreign policy of today, *i e*, resistance to Communist aggression in Europe and Asia

Exclusive federal control and its basis

We have the word of the federal Supreme Court for it that, even if no authority could be found granted in the constitution, nor indeed any clauses from which it could be deduced, the conduct of foreign relations still would be a proper and necessary function of our national government as "a necessary concomitant of nationality " [1] There is, however, no lack of expressly conferred power Nowhere, it is true, is there a single blanket grant, or even any mention of 'foreign relations' as such But the president is authorized to "appoint ambassadors, other public ministers and consuls,' to 'receive *ambassadors and other public ministers,' and to "make treaties", the Senate* is allotted a share in treaty making, as well as in appointments, and Congress is given power to regulate foreign commerce and to declare war Moreover, federal control in this field is made exclusive by clauses forbidding the states to "enter into any treaty, alliance, or confederation"—or into *any* agreement or compact with a foreign power" except with the consent of Congress, or to engage in war unless actually invaded [2] By discriminating against alien residents in their land-ownership or other laws, or by failing to do justice when aliens suffer from mob violence, the states may raise difficult international problems for the national government But that government has the sole right and power to handle such matters internationally If we are to

[1] United States v Curtiss Wright Export Corporation 299 U S 304 (1936)
[2] Art I, § 10, cls 1 3

believe the Supreme Court, it has *all* power (not actually prohibited, as for example by the bill of rights) to act for us in the international field, with or without constitutional authorization, express or implied

Federal responsibility nevertheless diffused

By nature the conduct of foreign relations is an executive function, and in the decision cited above the Supreme Court has termed the president 'the sole organ of the federal government in the field of international relations' While, however in the eye of the law relations abroad are "conducted' by the chief executive exclusively—personally or through agencies deriving their authority from him—other parts of the government, particularly the Senate but also Congress as a whole, are constitutionally endowed with functions cutting deeply into the field, so that while, in outlining the pattern of control over our foreign relations, we certainly must allow the president the center of the picture, such emphasis would be misleading unless at the same time it were made clear that in practical fact what we have in this area of governmental activity is a responsibility shared by the executive and legislative (and, in matters of interpretation and enforcement, even the judicial) branches—a responsibility considerably more diffused than that prevailing in the corresponding field in any other important country For this product of our constitutional heritage—this "invitation to struggle for the privilege of directing American foreign policy"—we often pay a price in terms of unpredictability, delay, confusion, and frustration Practicable means of narrowing the areas of potential friction are, however, difficult to discover

## ADMINISTRATIVE ORGANIZATION—THE DEPARTMENT OF STATE

The Senate and House of Representatives have standing committees on foreign relations and foreign affairs, respectively, and several executive departments, as well as numerous unattached agencies, touch the field at various points As supreme director of our dealings abroad, the president however, works mainly through the oldest and most imposing of the nine departments, *i e* the Department of State, and any comment on things done calls for a word at the outset on this indispensable agency for doing them

1 Functions

Subject always to presidential direction and control, the secretary of state and his subordinates perform tasks falling into four main categories (1) gathering information necessary to enable the president primarily, but also other officials, Congress, and even the press and public, to keep abreast of national policies and international situations throughout the world (2) serving, under the president, as principal executive agency for formulating and implementing foreign policy, and for handling a wide variety of matters like extradition, representation of the United States in international conferences and organizations, and American participation in the United Nations, (3) representing the United States abroad through the Foreign Service, carrying on negotiations with other governments, concluding treaties and trade agreements, and protecting the life, property, and asserted or established rights of American citizens beyond our borders, and (4) interpreting

American institutions, culture, and policies to foreign governments and peoples At the very minimum, the State Department must stand ready at all times, in peace or war, to formulate (with the president) any policies which the protection or promotion of American rights and interests abroad requires, and to employ all of its resources in carrying them out

2 The secretary of state

Although only one of the executive departments (Labor) is more limited in personnel, the Department of State, including the Foreign Service—a former auxiliary now fully absorbed—is, in the geographical sweep of its activities, the most extensive of all, being indeed the long arm by which the federal government reaches out to and deals with matters large and small, in countries far and near, in every quarter of the globe At the Department's helm is, of course, the secretary of state, commonly the most conspicuous cabinet officer, and in any case endowed with a certain primacy by statutory recognition as next after the vice-president, speaker of the House, and president *pro tempore* of the Senate in the line of succession to the presidency His is the oldest department, with functions of a more delicate nature than those of any other, and usually he sustains more intimate relations with his chief in the White House than does any other department head Not all secretaries of state have been great men or able administrators, and comparatively few have, like Jefferson and Hay, brought to the office actual experience in diplomacy The roster of incumbents since 1789 has, however, been adorned with enough honored names—Jefferson, John Marshall, Madison, John Quincy Adams, Clay, Webster, Calhoun, Seward, Blaine, Hay, Root, Hughes, Stimson, Hull, George C Marshall—to have invested the secretaryship, like the presidency itself, with a lofty tradition

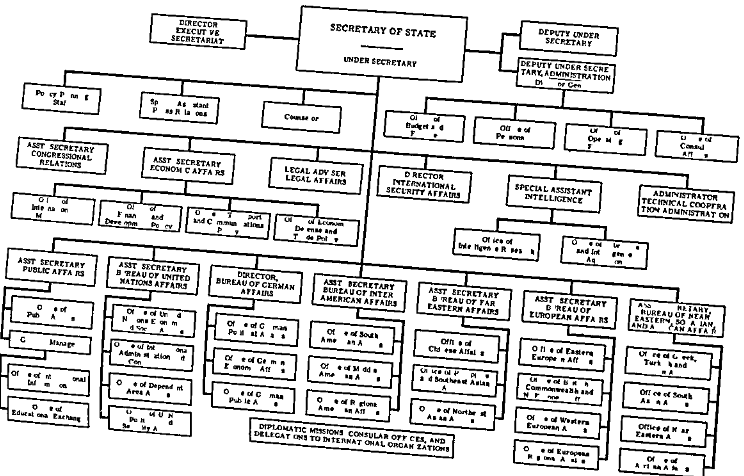
3 Departmental organization

Many circumstances combine to render the internal organization of the Department exceptionally fluid, and even if a detailed description were feasible here, it would not long hold true The most recent of numerous reorganizations in late years was started in 1949 in pursuance of recommendations offered by the Hoover Commission,[3] and has since been going forward intermittently under discretionary authority granted the Department head Principal features of the structure now (1951) to be observed are

1. An under secretary of state (serving as acting secretary when his chief is absent or incapacitated, and likely to be, next to the secretary, the most influential member of the Department)
2. Two deputy under secretaries, one functioning chiefly in connection with policy and the other with administration
3. A number of upper level specialized officers such as the four special assistants to the secretary, the "ambassador at large,"[4] the counselor, and the legal adviser
4. A battery of eight assistant secretaries heading main branches, in four instances of a geographical nature, *i e*, Inter-American Affairs, Near Eastern, South Asian, and African Affairs, European Affairs, and Far Eastern Affairs, and in other cases functional, *i e* congressional relations, public affairs (international information—including "Voice of America" broadcasts—educational exchanges, and the like), economic affairs, and United Nations affairs

[3] *Foreign Affairs A Report to the Congress* (Washington D C, 1949), 28-68
[4] Assisting the secretary of state in important negotiations and performing special assignments given him by the secretary or the president

# DEPARTMENT OF STATE



5 Under each assistant secretary (where appropriate) varying numbers of offices sometimes geographical and sometimes otherwise
6 Under each office of a geographical nature varying numbers of country desks staffed with officials charged with matters pertaining to a particular country within a given area

All in all there are more than 100 separate units and personnel numbers close to 25 000

4 The Foreign Service

Department machinery thus far outlined is localized in the national capital Operations are carried on however over the entire world and the agency through which this distant work is performed is the Foreign Service formerly an autonomous establishment under its own director general but since 1949 legally an integral portion of the Department Viewed broadly the Service consists of

(a) Composition

1 Chiefs of mission *i e* ambassadors and ministers who however are in various ways on a rather different footing from the remainder
2 Foreign service officers in six classes or grades and holding titles of counselor first second or third secretary consul general consul or vice consul (in a few instances even minister) according to their rank and the post they occupy
3 Foreign service reserve officers (also in six classes) appointed from other government agencies or from private life and assigned to duty as attaches or otherwise for non consecutive periods of not more than four years each
4 Foreign service staff officers and employees (in 22 classes) including all other American personnel and consisting mainly of administrative assistants accountants clerks stenographers typists receptionists translators couriers and guards and assigned and transferred to posts abroad as needed
5 Alien clerks and employees including interpreters custodians chauffeurs porters and the like [5]

(b) Examinations and appointments

Ambassadors ministers and foreign service officers are appointed by the president and Senate foreign service reserve officers foreign service staff officers and employees and consular agents by the secretary of state and alien clerks and employees are chosen in the field subject to the latter official s approval In earlier days there were separate diplomatic and consular services and both suffered from the spoils system Presidents Cleveland Theodore Roosevelt and Taft instituted competitive examinations for certain grades but members of both services above the rank of secretary were not affected and accordingly seldom long outlasted the Administrations that appointed them or at any rate survived a change of the party in power In merging the two services a Rogers Act of 1924 considerably broadened merit provisions and put them for the first time on a statutory basis and later legislation carried the reform farther—although even yet among the categories enumerated above only foreign service officers are appointed after competitive written and oral examinations Foreign service reserve officers and foreign service staff officers and employees must show qualifications and experience but are not formally examined

Foreign service officers

A very important place in the system however is occupied by the foreign service officer and something more may be said about how he is selected

[5] In 1951 the total force numbered some 16 000 compared with about 9 000 in other branches of the Department

To begin with, the examinations which he must take are of such a nature that only well trained college graduates, or persons of equivalent attainments can hope to pass them As a rule, the written tests, covering four general and three special fields and conducted by the Civil Service Commission for the Foreign Service s board of examiners, are held in September at some 20 places throughout the country are taken by from 600 to 800 young men and women and are successfully passed by from 60 to 100, while among the successful at this stage all but 25 or 30 usually are eliminated by the rigorous orals held the following January (or later) in Washington by the board of examiners itself and stressing character, personality, experience, and proficiency in modern languages [6] Candidates must be between the ages of 21 and 30 citizens of the United States, and previously designated by the board of examiners for examination Women are eligible, and since 1922 a few not only have met the tests imposed, but later have received appointment All successful candidates are recommended by the examiners for appointment to the lowest class in the foreign service officer bracket (under exceptional conditions, to the next higher class), their names being placed on an eligible list from which the president makes nominations to the Senate as required and the usual routine is for an appointee to be given a preliminary or preparatory term of a few months as salaried vice consul at some near-by post (*e g*, Mexico City or Ottawa) then to receive some months of intensive instruction in a Foreign Service Institute operated in the State Department at Washington and only afterwards to be given regular assignment as a full fledged foreign service officer All examinations being designed to test intelligence and capacity as well as immediate knowledge, foreign service appointees are expected to demonstrate fitness to advance from grade to grade, and promotions are based upon merit, with minimum periods of service in each particular grade

(c) Status of ministers and ambassadors

As throughout the past ambassadors and ministers [7] are appointed by the president and Senate on grounds in which political and personal considerations *e g* reward for party services, may weigh heavily Tenure, too, is uncertain, and sometimes brief, especially if the party to which the incumbent belongs soon goes out of power To be sure, the Rogers Act and the more recent Foreign Service Act of 1946 have as one of their objectives the encouragement of young men of ambition and talent to make the foreign service a career, and to that end both statutes require the secretary of state to give the president from time to time the names of members of the Service who have demonstrated their fitness for promotion to the grade of minister, and in recent years

a gratifying number of such promotions have been made. Until of late, an obstacle of considerable seriousness arose from restriction of salaries to a range between $10,000 and $17,500, with many posts paying too little to attract persons of limited means. Under the Foreign Service Act of 1946, however, the range is $15,000 to $25,000, plus allowances, and although the increase by no means enables all chiefs of mission to live within their stipends, the situation is improved. There is advantage in a system flexible enough to permit the president to choose our highest diplomatic officers from men of standing and achievement in all professions and fields, and some of our ablest and most successful representatives abroad have been persons without previous diplomatic training or experience. But, also, it is pleasing to know that the rank and file of foreign service officers is now so improved that the chief executive cannot find excuse for failing to draw from the "career men" in it with increasing frequency.

By and large, our consular service long has been as efficient as any in the world. Notwithstanding shining exceptions, our diplomatic service has, in times past, ranked rather low. In so far, however, as our presidents, resisting personal and party pressures, henceforth succeed in filling ministerial and ambassadorial positions *not with political appointees, but with men who* either have come up with distinction through the secretaryships, counselorships, and similar offices or have attained equally desirable qualifications by experience in other fields, an ancient ground of reproach will have been removed, and it is gratifying that in 1950, when we maintained 57 ambassadorial posts and 12 ministerial posts, some 68 per cent of the incumbents were appointees from the career service. The commanding position that our nation has gained since 1917 and the ever growing complexity of our relations abroad, both in peacetime and in wartime, demand not only an extensive but a strong foreign service—strong at the top no less than at the bottom. Appropriately, the Foreign Service has been termed our first line of defense.

## SOME PRESIDENTIAL FUNCTIONS

With the Foreign Service as its field organization, the Department of State is the chief operating agency through which the country's foreign relations are carried on. For ultimate controls, however, one must look farther—primarily to the president as supreme director, but also to the Senate in connection with appointments and treaties, and even to Congress as a whole, supplying funds, implementing policies by appropriate legislation, sometimes in effect determining policies independently. To the intertwined activities of *president, Senate, and Congress* in the international arena, we therefore turn.

1. Carrying on foreign intercourse

Basic to everything else is day-by-day intercourse with foreign governments, and for this the president (employing the facilities of the State Department) is the official channel. On the one hand, subject to the Senate's right of confirmation, he appoints all ambassadors and ministers to foreign countries, and all foreign service officers (including consuls) stationed therein, with, of course, the full power of direction and removal which the appointing

power carries Indeed, in the belief that in some situations they can be more useful in promoting his policies than can the regular diplomats, he may send abroad 'special," 'secret," or "personal" agents taking orders only from himself directly and paid (if at all) out of his contingent fund[8] Conversely, he receives, on his own responsibility, all foreign ambassadors and other public ministers, with power also, if occasion requires, to break off dealings with them and in effect send them home, as happened in the case of the Bulgarian representative in 1950 Through the State Department, he carries on correspondence abroad, obtaining information, declaring policy, pressing claims, offering settlements, and replying to all manner of inquiries and proposals Congress, on its part, may not address any foreign power or receive any communication from one, and any private citizen or corporation undertaking 'directly or indirectly, to carry on verbal or written correspondence or intercourse with any foreign government or its officers or agents [without express authority from the president] designed to influence the measures or conduct of any foreign government in relation to any disputes or controversies with the United States or to defeat the measures of the government of the United States," becomes liable to penalty

While however, normally using the State Department as his channel to such a degree that foreign governments ordinarily must address the White House not directly but only through the Department, the president may go as far as he likes in handling matters directly and personally—even to the extent of practically managing the country s foreign relations from his own desk, as did President Wilson during World War I and President Franklin D Roosevelt (to the considerable annoyance of Secretary of State Hull) at intervals during World War II, or going abroad to lead in the negotiation of a great international settlement, as did Wilson when peace was to be made in 1919, or meeting and conferring with representatives of foreign governments at any places (in either hemisphere) selected for the purpose, as Roosevelt repeatedly met and conferred with Churchill and Stalin (and on one occasion with President Chiang Kai shek) during World War II

2 Recognition

From authority to speak for the nation in its dealings abroad springs a second significant presidential function *i e*, that of determining the attitude to be taken by our government toward newly risen states or newly risen political régimes in existing states As to who is to decide whether we shall officially "recognize' and have dealings with such states and régimes or, on the other hand, shall simply ignore them, the constitution is silent, and at various times it has been argued that Congress is entitled to participate along with the president International usage, however, designates the function as executive, the power to appoint and receive envoys certainly would make it such in the United States, and precedent, backed by judicial opinion, places it wholly in the president's hands, subject only to the discretion of the Senate in confirming diplomatic appointments and assenting to treaties, and to that

[8] Well known recent examples include missions of Harry Hopkins to deal with Prime Minister Churchill and Marshal Stalin during World War II of Myron C. Taylor to the Vatican on various occasions after 1940 and of George C Marshall to China in 1945-47

of both houses in voting foreign service appropriations Recognition may take the form of welcoming into the family of nations (so far as we can do it by our own action) a state that has lately asserted its independence—as President Monroe, after 1817, recognized a number of newly risen Latin American republics, or as President Theodore Roosevelt in 1903 recognized the republic of Panama, thereby paving the way for construction of the Panama Canal, and the usual method in such instances is to send and receive diplomatic representatives Or recognition may take the form of instituting official relations with a new political régime that has taken over in a given country, as when, in 1933, President Franklin D Roosevelt recognized the government of the U S S R by concluding a treaty with the Kremlin It also, of course, may be withheld, as when Presidents Hoover and Roosevelt steadfastly refused to recognize the puppet 'state" of Manchukuo established under Japanese auspices on Chinese soil in 1932, or when, more recently, President Truman declined to follow Great Britain's lead in recognizing Communist China Recognition may be withheld from a political regime because we disapprove of it, as in the instance of President Wilson's refusal to have dealings with Huerta's government in Mexico in 1915 Usually, however, it will be extended to any regime, however distasteful to us, which gives evidence of willingness to abide by the accepted rules of international law—which the Soviet Union, contemptuous of American property rights, long did not, and which Communist China does not today Recognition of a new state or regime before it gives evidence of stability is premature and may lead to threat of war On the other hand, we are not obligated to recognize even after stability has been attained [9]

3 Protection of citizens abroad and of alien residents

'Under our system of government," the courts have declared, "the citizen abroad is as much entitled to protection as the citizen at home", and it falls to the president to see that such protection is duly extended, whether on the basis of treaty provisions usually covering such matters or otherwise If an American sojourning in a foreign land or traveling on the high seas is mistreated and cannot obtain justice, the president, acting through the State Department, may make demands in his behalf, and may go to any length short of a declaration of war to obtain redress for him Similarly, it is the president's duty—up to the limits of national authority—to see that protection is extended to aliens legally domiciled in the United States He must execute all provisions of the constitution, the national laws, and treaties bearing on their rights, and while he has no way of compelling state authorities to guarantee equal treatment in matters, like land ownership, outside the scope of national jurisdiction, he may admonish them to be mindful of alien rights and may instruct district attorneys to lend aliens needed legal aid In time of war abroad, he may be of assistance to both aliens and citizens by issuing a proclamation of neutrality calling attention to

[9] Still another form of recognition presents itself when an insurrection having arisen in a country the president officially acknowledges the insurgency or even the belligerency of the insurrectionists by giving them (so far as the United States is concerned) certain rights which they would not have as mere rebels President Cleveland thus recognized a state of insurgency in Cuba in 1895

rules of international law and to statutes forbidding various unneutral acts When the United States is itself at war, however, the rights of aliens of enemy nationality become merely such as international law recognizes in situations of the kind, and the president is not obligated beyond that point

## INTERNATIONAL AGREEMENTS

Speaking broadly, the activities thus far reviewed are unilateral, in the sense that they are carried on as our government independently chooses, except as restricted by the Senate's check upon appointments, they also are almost entirely presidential Other activities, however, are bilateral, or even multilateral, in the sense that they entail reciprocal participation by foreign governments, in them, too, Congress—at all events the Senate—usually plays an important rôle Three activities of this type—all in the nature of international contractual undertakings—call for attention here, *i e*, treaties, executive agreements, and joint resolutions

Treaties

A main instrumentality for regulating and stabilizing international relations is treaties, and the constitution provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur " [10] Under the Articles of Confederation, Congress made treaties, and the framers of the constitution at first thought of giving the power to the Senate As, however, the concept of the presidency grew in their minds, the view developed that it would be better to assign treaty-making, along with the general management of the country's foreign relations, to the chief executive, associating with him the Senate (then a small body) as an advising and restraining council The House of Representatives was deliberately omitted from the plan in the interest of "secrecy and dispatch ', and assent to treaties by two-thirds, rather than simple majority, of the Senate was specified, not primarily in deference to any general policy or theory, but mainly to protect important interests of certain sections of the country from being "sold out ' by bare Senate majorities

Scope of the treaty power

So far as they went, these arrangements for treaty-making, although now widely regarded as defective, were simple and obvious enough But they left open one fundamental question on which sharp differences of opinion soon arose, *i e*, how far, under a system of limited and enumerated federal powers, was the treaty power to be regarded as extending? Could treaties deal with matters outside of those constitutionally committed to the national government? And, with legislation often required for making treaty provisions effective, could a treaty open a way for Congress to exercise legislative powers not otherwise possessed? Approaching the matter from this strict-construction, states-rights viewpoint, Thomas Jefferson sought to establish the view (1) that the constitution's provisions on treaty-making merely set forth a procedure for exercising granted powers and are not themselves a substantive grant, (2) that the president and Senate have no right to employ treaties as means of in effect evading constitutional restrictions generally applicable to the govern

[10] Art II, § 2 cl 2

ment, and (3) that treaties entailing extraconstitutional legislation should not be negotiated

In later days, however, the matter commonly has been viewed differently, and many court decisions could be cited not only making the constitution's treaty clause a distinct grant of federal power, but interpreting it as opening a way for treaty-making on almost any subject (whether or not known to the constitution), and for endowing Congress by this means with regulative authority for which no direct or implied constitutional basis can be found Long ago, indeed, the Supreme Court recognized the treaty power as extending to "all proper subjects of negotiation between this government and those of other nations," regardless of the constitution[11] And when, in 1918, Congress, in pursuance of a treaty with Great Britain authorizing agreements between the United States and Canada for the protection of migratory birds, *enacted a stringent measure on the subject, the Supreme Court fully sustained* the law[12] on the ground (1) that while control of bird life is, of course, not a power which the constitution's Art I, §8, directly confers upon Congress, it is a proper subject for treaty agreement, and (2) that treaty making is one of the many powers "vested in the government of the United States" which that section's clause 18 (the "sweeping clause") authorizes Congress to follow through, or implement, by legislation In order to be supreme law of the land, acts of Congress must be "made in pursuance" of the constitution Treaties, on the other hand, are required to be made only "under the authority of the United States" Yet a treaty is a constitutional instrument And under its expansive coverage, a statute otherwise defenseless may find constitutional protection Of course, treaties themselves, or given provisions of them, may be rendered unenforceable by conflicting congressional legislation They also may be invalidated domestically by the courts as contrary to the constitution Outside of this, however, the treaty making power is practically unrestricted[13]

Can a treaty confer legislative authority?

The language of the constitution seems to associate the Senate with the president throughout the entire process of concluding and ratifying a treaty, and not only do passages in *The Federalist* indicate that this is what the framers had in mind, but President Washington actually began his treaty-making (with certain tribes of Southern Indians in 1789) on that assumption, once or twice appearing *in the Senate for the purpose* A few years of experience demonstrated, however, that it was more practical for the president to "make" a treaty and not seek the Senate's "advice and consent" until afterwards, and this has since been the procedure, with the Senate merely assenting (or not) to the final formality of ratification making the instrument effective on our part To be sure, either branch of Congress, or the two con-

Presidential initiative in treaty making

[11] ... 14 Peters 540 569 (1840)

currently, may, by resolution, advise or request that a given treaty, or series of treaties, be negotiated, and as a matter of expediency, the president and secretary of state invariably keep in touch with the Senate committee on foreign relations when an important negotiation is in progress, sounding out sentiment and ascertaining how far it is safe or wise to go in this direction or that—a precaution the more necessary because, under the two-thirds rule, a treaty usually must enlist the support of members of both political parties if it is to be approved[14] But unless the chief executive chooses to set the necessary machinery in motion, no negotiation can be started, he can begin a negotiation regardless of the desire (and even without the knowledge) of either branch of Congress, and the number of instances in which the Senate as a body has been given opportunity to express itself on a proposed treaty before the completed instrument was transmitted to it, does not exceed a dozen Short of flatly withholding assent to ratification, the most that the Senate can do by way of registering disapproval of a treaty placed before it is (1) to attach amendments making it necessary for the president to renew negotiations aimed at securing the foreign government's acceptance of the proposed changes, or (2) in the case of a great multilateral agreement on which negotiations could not well be reopened, to assent to ratification but attach reservations designating various features of the agreement as not to be held binding on the United States

*Optional courses of action enjoyed by the president*

In exercising his powers of initiative and direction, the president may (1) work through the regular diplomatic representative accredited to the foreign government concerned, or (2) appoint a special plenipotentiary or commission to go abroad for the purpose, or (3) cause negotiations to be carried on in Washington through the secretary of state, or, finally, (4) undertake, or at least participate in, negotiations himself, as did President Wilson in connection with the Treaty of Versailles in 1919 Moreover, when a treaty is completed, he has full freedom to submit it to the Senate, return it to the negotiators for revision, or drop it altogether He may hold it back because he considers it unsatisfactory, or because he recognizes that submission of it to the Senate would be useless Indeed, even after the Senate has given its consent, a treaty still may be held up It remains for the president to ratify it, and, upon being apprised of ratification by the other government (or governments), to promulgate it, and he has the option of refusing to take these last necessary steps, although naturally he will do so only under very unusual circumstances

*The role of the Senate*

"A treaty entering the Senate," wrote John Hay after six years of experience as secretary of state, 'is like a bull going into the arena, no one can say just how or when the final blow will fall—but one thing is certain—it will

[14] The pres dent may ndeed make one or m [illegible] members of a negotiating com

never leave the arena alive '[15] That this, however, is too strong is evidenced by two or three facts (1) no treaty ever was rejected outright by the Senate until 1824, (2) the total number so rejected throughout the history of the country to 1935 is only 62, and (3) while in about 100 other cases to the date mentioned the Senate either failed to act or insisted on amendments or reservations of such character that either our own government or the other party (or parties) chose not to go farther with the project it unconditionally approved some 900 treaties or more than four fifths of the entire number presented to it Many treaties slip through with no opposition at all Those that stir controversy however encounter a genuine hurdle in the two thirds rule, and it must be admitted that of the treaties that have come to grief in this way a large proportion have been of first rate importance, *e g*, the treaty for the annexation of Texas in 1844, the Olney Pauncefote, Hay, and Taft Knox arbitration treaties of 1897, 1904, and 1911-12, respectively, the Treaty of Versailles in 1920, the St Lawrence Waterway Treaty of 1934, and the protocol for adherence to the Permanent Court of International Justice (World Court) in 1926 and 1935, and further, that many which finally emerge unscathed do so only after a great parliamentary battle, calling into play every sort of pressure from the White House

Dissatisfaction with the existing system

For 100 years or more the treaty procedure outlined served, on the whole, acceptably In later days however it has given rise to a great deal of dissatisfaction To begin with the two thirds rule although conceded to have been perhaps defensible under eighteenth century conditions is alleged to be out of harmony with our present day democracy, based as it is upon the principle of government by simple majority[16] A second objection often voiced is that the rule makes it too easy for special interests to hold up a treaty or defeat it Inasmuch also as a very large proportion of senators are elected by predominantly rural populations in thinly peopled agricultural states, the great weight assigned to the Senate in treaty making gives, in the opinion of some, too much power in this particular domain to populations remote from the coasts and more or less provincial in outlook Yet another complaint is that the House of Representatives is placed in the awkward position of being practically obliged to vote appropriations, and sometimes enact legislation, for putting treaties into effect, although powerless over making and ratifying them Finally may be mentioned criticism traceable since 1920 to the conviction of many people that but for the obstructionist attitude of a Senate *minority*, the United States would, as a member of the League of Nations and

[15] W R Thayer *Life and Letters of John Hay* (Boston 1920) II 393 Under Senate Rule XXXVII a treaty received from the president is given a first reading referred to a standing committee (naturally that on foreign relations) reported back with or without amendment

states

adherent of the World Court, have contributed to international cooperation a degree of vigor that might possibly have changed the entire course of world events in the past unhappy decade and a half

Proposed changes

There are, of course, those who would leave matters as they are, and they undoubtedly include a substantial majority of the senators themselves But most people who have thought seriously about the subject favor one or the other of two principal proposed changes, *i e*, (1) to authorize the Senate to assent to the ratification of treaties by simple majority (either of those present or of the total membership) instead of two thirds, and (2) to make ratification contingent on the assent of such majorities in *both houses* Notwithstanding that the latter plan might prove responsible for deadlocks and delays it probably is preferable, although neither could be adopted without a constitutional amendment, which, requiring an initial two-thirds vote in the Senate, would be exceedingly difficult to obtain [17]

Execution and termination of treaties

Once duly ratified by the government concerned and proclaimed by the president, a treaty becomes, from the international point of view, a contract between the United States and the nation (or nations) constituting the other party, and from the domestic point of view, an extension of the law of the land supreme and enforceable like any other portion of that law, and both federal and state courts must give it full effect Of course, not all treaties are, or are intended to be permanent Some expressly provide for their own expiration, some are terminated by war, some are replaced by new agreements, some are abrogated by being 'denounced' by one or more of the parties When it is desired in this country to dispense with a treaty, or some portion thereof, our government is likely to seek an agreement to that end with any nation or nations concerned In default of such agreement, however, the president may, on his own authority simply proclaim the treaty at an end, or he may take such action with the support of a joint resolution of Congress, or Congress itself may make any of the treaty's provisions of no legal effect by enacting legislation inconsistent with them Although treaties are 'law of the land,' the Supreme Court has said that they are no more truly such than are acts passed by Congress Invariably the Court has been reluctant to construe a statute as in violation of a treaty, but when there is manifest conflict, the later in date prevails [18] Neither a court decision nor a statute can, however, abrogate a treaty as an international contract Although unenforceable at home, it preserves its international status until revoked by executive action, and in the meantime the foreign power concerned may construe a crippling judicial decision or statute as a breach of contract entitling it to reparation through an international proceeding

2 Executive agreements

Treaties can be ratified and become operative only with the advice and consent of the Senate But not every agreement entered into with a foreign government takes the form of a treaty Increasing numbers, instead, are

"executive agreements," for which—notwithstanding that there is no mention of them in the constitution, and that as a rule they are to all intents and purposes treaties—consent of a two thirds senatorial majority is neither sought nor obtained[19] In some instances, e g postal conventions and trade agreements such agreements rest upon authority conferred in advance by blanket act of Congress Others however, are concluded by the president (directly or through agents) without such authorization—sometimes in pursuance of a treaty, sometimes as commander in chief of the armed forces, and occasionally simply as chief executive and supreme representative of the country in its dealings with foreign states And if they are submitted on Capitol Hill at all (as many are and by nature must be), it is not to the Senate alone, as in the case of a treaty but to the two houses for approval by majority vote in each Furthermore not only are such agreements upheld by the courts as 'supreme law of the land but the limits to which the president may carry them are nowhere defined[20] Many agreements deal with minor matters which, on their face, do not call for a treaty—for example pecuniary claims of American citizens against foreign governments But others relate to affairs of considerable importance Indeed an executive agreement may become frankly a means of evading—temporarily at least—the necessity of going to the Senate with a treaty In 1905 President Theodore Roosevelt worked out a treaty with Santo Domingo specifying that the United States should guarantee the security of that republic and take over the collection of its customs duties with a view to settling foreign claims and warding off European intervention The Senate refused to consent to the treaty, whereupon the President entered into a *modus vivendi* with the Dominican government on precisely the lines desired, and for two years the protectorate was maintained simply on this basis In 1907, a treaty regularizing the arrangement was at last assented to and ratified

Congress and executive agreements

So far, indeed was the power of executive agreement formerly carried that in 1941 a responsible State Department official could seriously argue, not only that the two thirds rule in the Senate is a peril to the national welfare, but that anything that can be done by treaty can also be done (and the implication was *should* be) by executive agreement The war years then dawning however saw an uprising on the matter in a quarter where it was most likely to occur—the Senate Executive agreements of 1940 under which the United States secured from Great Britain 99 year leases of sites in the Atlantic for possible development as naval bases and from Denmark the

[19] In his *International Executive Agreements* (New York 1941) W McClure computes that the total of executive agreements entered into by our government between 1789 and February 1941 was well over 1 250—a third more than the number of treaties Not all

right to take various precautionary measures in Greenland and Iceland, were so obviously germane to the president's function as commander-in chief that they stirred little protest When, however, in pursuance of power conferred in the Lend Lease Act of 1941, the State Department, under presidential direction, began concluding agreements with Great Britain, the U S S R, China, and other nations involving a network of long term commitments running into billions of dollars, dissatisfaction manifested itself And when, in 1943 it was learned that a United Nations Relief and Rehabilitation Con vention was to be handled as an executive agreement and not referred to the Senate, notwithstanding that it entailed ' practically illimitable obligations for the United States practically in perpetuity," the State Department was vigorously challenged Controversy ensued in which Secretary of State Hull was threatened with an official investigation, and in the end a compromise was forced under which, while UNRRA itself was entered into as a matter of executive-legislative action only, and without a treaty, the executive branch promised in future to be more circumspect about observing "constitutional processes,' which, in Senate phraseology, were expressly defined as meaning Senate approval by regular two thirds majority, and in 1945 the Charter of the United Nations was duly submitted for such approval—as were also the later Marshall Plan for aid to Europe in 1947 and the North Atlantic Pact in 1949

Plenty of room for executive agreements remains, and there still is, and probably can be no exact definition of their proper limits Wartime experi ence has, however, at least vindicated and reestablished the principle that significant financial commitments may not be made except by treaty, or at all events by agreement validated by the two houses, that, in general, agreements affecting the country s foreign interests and policies in any large and permanent way ought to be made only by treaty, and, finally, that the dividing line between treaty and some alternative procedure is one to be drawn, in the final analysis, not by the executive, but by the Senate or by Congress as a whole

3 Joint resolutions

A third recognized method of achieving international settlements takes the form of a joint resolution passed by simple majorities in the two branches of Congress and approved by the president When initiated by the chief executive and duly voted by Congress, a joint resolution is hardly distinguishable from an executive agreement entered into with congressional approval, indeed it usually is by joint resolution that an executive agreement is assented to on Capitol Hill In the case of a joint resolution, however, Congress itself may take the initiative—though action at the White House, as in the case of a bill is a necessary final step More than once in our history, a joint resolu tion requiring mere congressional majorities, has been resorted to when the treaty making process, calling for two thirds in the Senate, broke down Under such circumstances, Texas was annexed in 1845 and Hawaii in 1898, probably the Philippines would have been annexed in 1898 in the same way if the Senate had not at the last, and by a narrow vote, decided not to reject the annexation clause of the Treaty of Paris It was by joint resolution, too

that war with the Central Powers was terminated in 1921, after the Treaty of Versailles had failed of ratification at Washington, also that in 1934 President Franklin D Roosevelt was authorized to accede to Part III of the Versailles Treaty establishing the International Labor Office From time to time the device has been employed in still more recent years as for example in 1951 to end the war with Germany As it grows in favor the trend toward increased control of Congress over foreign relations at the expense of the Senate acting singly receives fresh impetus

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# CHAPTER 32

## Foreign Policy and International Organization

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The foreign policy of a nation may be defined as the principles and objectives dominating its actual or potential dealings with other nations, and in our troubled world no function of government is more important for nations and peoples than determining these principles and objectives—in other words, shaping foreign policy Great foreign policies like Britain's traditional "balance of power," American avoidance (until of late) of "entangling alliances," Japan's "new order" for Eastern Asia, Russia's propagation of Communism abroad, and more recently world organization for "collective security," have largely fixed the course of history in modern times

### FORMULATING AMERICAN FOREIGN POLICY

*Has the United States a foreign policy?*

Disturbed by the shifts and turns that have characterized the dealings of the United States with other nations, some people have charged that the country really has no foreign policy at all, but merely zigzags from position to position as the rough winds of international politics toss the ship of state about Undoubtedly it is true that our physical isolation in times past, our traditional aloofness from European affairs, and our preference for avoiding long-term commitments seemed for generations to manifest a rather negative attitude on many matters of concern to other nations Undoubtedly it is true, too, that officials guiding our dealings with foreign governments have been prone to feel their way through situations as they arose, to make choices and decisions as they went, and to leave records of performances not always remarkable for continuity or consistency Even aloofness, however, and preference for meeting situations as they arise, constitute policies, and actually we have had not only various broad over-all foreign policies characterizing different periods of our national history, but plenty of generally recognized and often cogently asserted policies toward particular countries and situations Certainly no one can deny that we have a present dominating policy of resistance to Communist aggression wherever appearing

*Who determines foreign policy?*

Under a totalitarian régime, foreign policy is fixed by a dictator, or at any rate by a handful of irresponsible officials like the Politbureau of today in the Kremlin, although even there, outside interests and influences certainly cannot always be ignored In a democracy, too, there must be some official or

agency for making final policy decisions In this case, however, the agency must be an integral part of the democratic set up, must operate by democratic processes, and must be prepared to be guided, and often even controlled, by influences rooted in public opinion

1 The role of the president

Under our American system foreign policy is planned or formulated primarily by the Department of State, on the basis of its wide experience, expert knowledge, and wealth of information currently supplied by its field force As indicated below, such policy is influenced too,—often profoundly—by Congress, by sundry federal departments and establishments, and by the state of the public mind In a period of international tension like the present, when nearly all major foreign problems center in the promotion of national security, much high level discussion, correlation, and tentative decision is contributed by the National Security Council touched upon in the following chapter [1] Technically however foreign policy is *made* (commonly by fusion of his own ideas with those of the State Department and the Security Council) by the president Even when not strictly the author of a given policy, he in effect becomes such by declaring it to the world and taking the necessary steps to carry it into effect, and whatever he announces ordinarily is accepted by other governments as expressing the attitude or purpose of the American nation

Some illustrations

When Washington proclaimed American neutrality in 1793, and in his Farewell Address warned his countrymen against political entanglements with Europe, he started the country on a course of "isolation" from which in later times only the most extraordinary emergencies ever availed to swerve it In a message to Congress in 1823 Monroe voiced certain principles concerning foreign political activities in the Western Hemisphere which under the name of the Monroe Doctrine, developed into one of the most enduring and important of all our foreign policies When, in 1844, President Tyler's secretary of state, Daniel Webster, instructed Caleb Cushing as our first emissary to China to see to it that the United States received assurance of equal economic opportunity in that country, he inaugurated a line of policy which, under the more familiar name of "open door," became, and long remained, the cornerstone of all American dealings with the Far East Theodore Roosevelt, Taft, and Wilson brought a number of Caribbean republics under the United States supervision and, for better or worse left us a policy of maintaining Latin American financial protectorates which only two decades ago gave way to the "good neighbor" policy instituted by President Hoover and amplified by his successor

During the earlier stages of World War II, President Franklin D Roosevelt led in formulating and carrying out the national policy under which the United States first severely strained and later frankly abandoned its neutral position in order to give aid to Great Britain and other fighting nations which, in the Chief Executive's opinion, must at all costs be kept from going down Similarly, he bore full responsibility for the government's unyielding opposition to Japan's proposed "new order" in Eastern Asia, bringing the two countries to

[1] See p 537 below

the brink of war by 1941 and precipitating them into actual combat before the year ended In the Atlantic Charter of 1941, he joined with Prime Minister Churchill in proclaiming broad postwar international policies to which the United States was solemnly committed on his sôle responsibility Rarely consulting Congress he further determined and declared policies throughout the war often as a sequel of conferences with top officials of allied states, and step by step the way was prepared for emergence of the present United Nations Early in 1947 President Truman enunciated the "Truman Doctrine" calling for economic bolstering of nations threatened by Soviet imperialism, in 1948, he committed the United States to foreign military assistance as well, in his 1949 inaugural he announced the "Point Four" program for technical help for underdeveloped areas in both hemispheres, and in 1950 he fixed our policy when faced with overt Communist aggression by sending American troops into battle in Korea

When a foreign complication arises or a new international problem presents itself, it is the president (speaking directly or perhaps through his secretary of state) who has the first opportunity to say what the attitude of the nation shall be, and by the stand which he takes he can so put the country on record that it will be next to impossible for Congress, or even a later president, to change the course that he has set He indeed may lead the nation into war, for although he cannot declare war, he can adopt an attitude or create a situation making war unavoidable

2 Congressional controls and limitations

Nevertheless, the president and State Department do not frame and carry out foreign policy in a vacuum, or always have their own way Not only do other executive departments, especially the Department of Defense, provide information, supply incentives, develop plans, and occasionally, in particular situations, even formulate policy independently, but establishments like the United States Tariff Commission, the United States Maritime Commission and preeminently the National Security Council, contribute to the ultimate pattern More important, only rarely can major policies emanating from the executive branch achieve their purposes unless formally or informally assented to, and perhaps financially implemented, by Congress, and they may be completely frustrated by lack of congressional support A zealous Congress forced upon a reluctant chief executive the War of 1812, and likewise the intervention in Cuba in 1898 which led to the war with Spain the annexation of the Philippines, and a long train of other momentous consequences An unconvinced Senate balked President John Quincy Adams in his Pan American policy, Pierce in his Cuban policy, Grant in his Dominican policy, Cleveland in his Hawaiian policy, and Wilson in his endeavor to put the United States into the League of Nations One of the top ranking standing committees in each of the two branches is the committee on foreign relations ("foreign affairs" in the House), in which, in connection with proposed legislation (and, in the Senate committee, with foreign service appointments and treaties) problems of foreign policy receive extended discussion, sometimes supplemented by lively public hearings Other standing committees, too,—appropriations, banking and currency, agriculture, merchant marine and fisheries—

touch foreign policy at various points, and special committees may be set up to investigate phases or consequences of presidential policy-making From any of these directions may come criticisms or recommendations eventuating in decisions making it necessary for contemplated or operating policies to be abandoned or radically changed, and general statutes on trade, immigration, currency, even agriculture and labor, may materially affect and even declare foreign policy Finally, whatever funds may be required for carrying presidential policies into operation are obtainable only through appropriations voted by Congress For example in 1947 President Truman would have been unable even to start doing anything very tangible about fending off the spread of Russian domination in Europe and the Near East unless Congress had been willing to appropriate the $400 million requested for aid to Greece and Turkey as the first step followed by far greater authorizations for implementing the European Recovery Program or 'Marshall Plan' The upshot, therefore is that while the nation looks to the president even more anxiously for leadership in the foreign than in the domestic field and while his liberty of action in foreign affairs certainly is greater our dealings abroad are, after all, controlled by no single branch of the government, but rather are shaped, even if somewhat unequally (and more so now than before 1940) at both ends of Pennsylvania Avenue[2]

**3 The role of public opinion**

Moreover, back of both president and Congress stand the people, and although ordinarily the state of popular information on and interest in the affairs of distant nations still leaves a good deal to be desired, in the last analysis no long term program of foreign policy can be carried out that lacks the support of the voters, evidenced through elections, the press, and in other ways "No matter," ex-Secretary of State Hull once remarked, 'how brilliant and desirable any course may seem, it is wholly impracticable and impossible unless it is a course which finds basic acceptance by the people of this country" Here, as in other areas of planning and action, the chief executive and leaders in Congress must ascertain, study, and assess public opinion, failing to do so, they may easily be betrayed into embarking upon a course of action leading straight to humiliating frustration at the hands of the people or their elected representatives Not infrequently, cross currents of opinion make it difficult to discern what the nation really thinks and wants with respect to a given situation or problem considerations of self interest and altruism
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Department, and Congress alike commonly are versed—of forming reasonably sure judgments as to how far the country as a whole is prepared to go in sup

predecessor had recaptured

porting a given line of policy, and most of the time, planning and action are kept within the limits disclosed—although sometimes, as in the case of the Marshall Plan, it becomes necessary to decide (if not also act) first and cultivate public opinion mostly afterwards

Supported by the State Department, the president may, of course, seek to win an uninformed divided or apathetic nation to a foreign policy which, from his superior vantage-point, he considers to be in the national interest. Molding public opinion on international matters may, indeed, become one of his supreme challenges Experience indicates, however, that in such efforts he must move cautiously and understandingly All may be lost by trying to hurry the country into abruptly throwing over some policy deeply rooted in tradition Four or five arduous years were required for Franklin D Roosevelt to lead the nation to a point where it was at least half-willing to convert itself into an "arsenal of democracy and to support policies carrying it straight toward involvement in World War II Almost as much time was needed for President Truman fully to persuade a people grown tolerant toward Soviet Russia during World War II that the Communist colossus had become our arch-foe, and that checkmating Soviet designs and aggressions was the policy above all others necessary for us to pursue In so far, however, as the chief executive succeeds in capturing public suport in matters of such magnitude, he becomes not only author of the nation's foreign policy but architect of its grand strategy

**The problem of unity in foreign policy**

In the realm of high policy, Great Britain long has enjoyed an advantage over us in that (1) by tradition Parliament expects to play a less restrictive role than does our Congress, (2) under a cabinet system, there usually is solidarity of purpose between the executive and a working parliamentary majority and (3) however profound their differences on domestic matters, British political parties commonly close ranks and present a solid front on foreign affairs Unity on foreign policy is not always lacking in our own country As originally proclaimed, the Monroe Doctrine had very general support No important element ever dissented from our principle of open door in China To most people, restriction of immigration seemed wise During the 1930 s, neutrality legislation designed to keep us out of war was generally endorsed Adherence to the United Nations in 1945 was by almost unanimous vote in the Senate, reflecting at least some approach to unanimity of public opinion as then existing Building up defenses against the Communist menace has broad nonpartisan national backing By and large, however, unity on foreign policy—however desirable, and at times essential—is in this country not easy to attain We have separate executive and legislative branches In the foreign field, policy decisions are supposed to be made primarily by the executive Yet the basic policy determining organ of our government is the legislature i e, Congress, and in practice the function is generalized to include not only sharp financial and other checks upon presidential policy-making but much direct policy-determination by Congress itself through legislation In foreign as in domestic affairs, the level of achievement depends heavily upon the extent to which executive and legislative branches

cooperate, and our record is filled with instances—of which President Wilson's failure to get the United States into the League of Nations is only one—of conflicts and frustrations arising from executive-legislative differences, often compromising the country's position and influence in world affairs

The party aspect

The matter, of course, has also its political as well as constitutional aspect. Much lip service has been paid the aphorism that politics ends at the water's edge But from the time when the Federalists favored the quasi war with France in 1798 1801 and the Jeffersonian Republicans opposed it, political parties more often than not have disagreed on foreign policy Under stress of grave international danger almost superhuman efforts of prudent party leaders during and after World War II achieved a "bipartisan foreign policy" contributing substantial unity in critical situations The harmony established always, however, was precarious and under conditions associated with war in Korea in 1950-51, bipartisanship almost totally collapsed Of late, the picture presented by our foreign policy has been anything but one of unity, with partisan and other discords—freely displayed, under our democratic procedures, to the entire world—gravely troubling the free peoples dependent upon us for assistance and leadership, while yielding proportionate satisfaction to elements looking to our differences eventually to destroy us

## PARTICIPATION IN INTERNATIONAL ORGANIZATION

Miscellaneous multilateral relationships

From early days, the foreign relations of the United States have been by no means confined to direct and separate dealings with other nations individually To begin with, they have been operated within a framework of international law, which, although often honored in the breach rather than the observance, is at all events a matter of more or less general international acceptance and agreement, and certainly not a creation of the United States or of any other nation singly In the second place many of our treaties have been not bilateral, but multilateral, with a considerable number of states as parties Then there is the matter of international bureaus, commissions, councils, unions, and other establishments to which the United States has become a party, often in pursuance of some multilateral convention or agreement—organs through which accredited representatives carry on international activities for us in many designated fields, often with little or no control from the Department of State Even before a galaxy of such agencies sprang from World War II and the United Nations, compilers of the *United States Manual*[3] were able to list as many as 70 such international bodies in which the United States was participating or to which it was giving financial support, ranging from an International Hydrographic Bureau, an International Bureau of Weights and Measures, and a Universal Postal Union, to the International Labor Organization created as an autonomous part of the League of Nations at the close of World War I and the Organization of American States (more commonly known by the name of its secretariat as the Pan American Union), dating from 1890 and linking up 21 republics of the Western Hemisphere for

[3] Now *United States Government Organization Manual*

purposes of friendly cooperation Organizations of the kind come and go, but the United States still bears some responsibility for approximately 75, many within the orbit of U N , but others quite independent

The League of Nations

Agencies of the kinds mentioned are, of course, forms of international organization and through channels of the sort the United States has been involved in such organization for a very long time Of a different order, however is international organization as represented by the now defunct League of Nations and by the more recently established United Nations With the relations of the United States to the ill fated League, most people now are familiar Conceived in the fertile brain of President Wilson and organized on a pattern which he largely devised, this ambitious association of states for the preservation of peace probably was foredoomed by refusal of our Senate to assent to the United States becoming a member, and after a checkered career of 20 years it collapsed under the weight of a global war which it had been powerless to prevent Even though outside, the United States could not, however, hold completely aloof from the League's activities, and we not only from time to time employed observers at Geneva, but participated in many conferences held under League auspices, ratified various conventions of League origin, took part in the work of several technical and other commissions performing League functions, and eventually (1934) joined the League-sponsored International Labor Organization, although persistently refusing to adhere to the Permanent Court of International Justice ("World Court") which the League set up

The United Nations

1 Origin and nature

But the most significant participation of the United States in international organization has come as a result of the challenging experiences of the past decade, for after one of the most extraordinary reversals of national attitude and policy on record, the country now finds itself in many respects the key member of the most imposing international association or union known to history, namely, the United Nations With the idea of such an organization growing in sharpness of conception and in public interest and support, preparations went on quietly in government circles at Washington for almost two years before representatives of the four leading Allied powers were gathered in conference at Dumbarton Oaks (an historic Washington estate), in August, 1944, to draw up a plan Two months of work resulted in proposals stirring wide, and generally favorable, discussion, but naturally leaving difficult problems still to be settled, and after some of the most thorny of these—relating especially to voting procedures—had been freshly canvassed by the leaders of the Big Three at the Yalta conference of February, 1945, responsibility for carrying the plan to completion was devolved upon a more general international conference convened at San Francisco in April, 1945 In this historic gathering, the Charter of the United Nations was written and signed by delegates of 50 different nations [4] Moreover, the new plan was quickly accepted and implemented Transmitted by President Truman almost

[4] *Charter of the United Nations Together With the Statute of the International Court of Justice* Dept of State Pub No 2353 (Washington D C 1948)

as soon as signed, the Charter swept through the American Senate by the remarkable vote of 89 to 2, other governments acted with such alacrity that, upon adherence of the U S S R , three months later, Secretary of State Byrnes was able to announce the Charter adopted, and the first U.N instrumentality brought into operation, the General Assembly, began functioning at London early in 1946[5] Doubts about the constitutional competence of the treaty making organs to put the United States into an association of the kind had troubled many senators and other persons in 1919 In 1945, however, little was heard of such hesitations Constitutional problems were raised, but hardly extending beyond matters of implementation

There were people when the Charter was framed, who would have been glad to see the traditional national state system discarded and some form of "world government' instituted Any step as revolutionary as that was, however, ruled out from the beginning, and the new organization, like the League before it, became legally only a voluntary contractual arrangement among states retaining full sovereign equality and declared exempt from any international intervention in matters within their several separate jurisdictions Originally, there were 51 such states, later admissions—most recently that of Israel in 1949 and Indonesia in 1950—have brought the roll to a total of 60

2. Agencies of the United States for U N participation

(a) A matter of "foreign relations"

What the United Nations does, essentially, is to provide a framework or pattern within which a nation carries on 'foreign relations" with other nations through collective channels instead of in the traditional nation by nation manner Of course, direct and independent diplomatic relations between nation and nation in the familiar manner continue—as do various unattached international commissions, bureaus and the like, and although the theory is that practically everything pertaining to the interests of world peace will be channeled through U N , there still are quite independent international discussions and agreements of the highest importance, yet affecting peace—for example, those culminating in the North Atlantic Pact of 1949 Indeed, there not only is overlapping between two spheres of action—nation by-nation and international organization—but possibility of confusion and conflict The present point, however, is that a member state's dealings within U N , such as they are, *are* foreign relations, to be carried on subject in general to the same constitutional checks and political limitations applying in the case of international dealings outside of the U N orbit

(b) Bureau of United Nations Affairs

This being the case, it is natural that the agency within our government primarily responsible for U N relations should be the Department of State So broad, it is true, is the range of U N functions and activities that few departments or establishments at Washington fail to have interests involved, and representatives of departments like Agriculture, Commerce, and Labor, and of establishments like the National Security Council and the U S Tariff

[5] American membership was finally and officially validated in a United Nations Participation Act of December 20 1945 (59 *U S Stat at Large* 619) By a vote of 60 to 2 the Senate on August 2 1946 also accepted for the United States compulsory jurisdiction of the U N's International Court of Justice although qualifying by excepting disputes on matters regarded by the United States as "essentially" within its own jurisdiction

# THE UNITED NATIONS SYSTEM

International Court of Justice

General Assembly

Security Council

Regional Security Arrangements and Agencies

National Contingents of Armed Forces

Land | Sea | Air

Military Staff Committee

Commission for Conventional Armaments

Atomic Energy Commission

Trusteeship Council

Economic and Social Council

Secretariat

International Law Commission

Collective Measures Committee

Peace Observation Committee

Interim Committee

High Commissioner for Refugees

International Children's Emergency Fund

Commissions

Fiscal

Statistical

Population

Social

Human Rights

Status of Women

Narcotic Drugs

Economic, Employment and Development

Transport and Communications

Economic Commission of Latin America

Economic Commission for Europe

Economic Commission for Asia and the Far East

Specialized Agencies

UPU — Universal Postal Union

ITU — International Telecommunication Union

ICAO — International Civil Aviation Organization

WMO — World Meteorological Organization

FAO — Food and Agriculture Organization

FUND — International Monetary Fund

BANK — International Bank for Reconstruction and Development

UNESCO — United Nations Educational, Scientific and Cultural Organization

ILO — International Labor Organization

WHO — World Health Organization

IMCO* — Intergovernmental Maritime Consultative Organization (Preparatory Committee)

IRO** — International Refugee Organization

▬ ▬ ▬ Re a ed by agreeme t

▬ ▬ ▬ Indirect relationship

** Opera ons e pe ed to te mina e December 3 1951

* Con ent on concluded Organ at on to c me in o being when su ent ati atio s a e e si ed.

Commission constantly advise State Department officers and representatives at U N meetings, with upwards of a dozen interdepartmental committees functioning similarly But it is on the State Department chiefly that respon sibility falls, and there is where one must look for the machinery through which our U N relations are officially carried on

The first agency set up for the purpose was a rather casually created Office of Special Political Affairs In 1948, however, this was replaced by a Bureau of United Nations Affairs, since developed into a main unit under its own assistant secretary of state and organized in four "offices" functioning as indicated by their names—(1) United Nations Political and Security Affairs (concerned broadly with affairs of the General Assembly), (2) United Nations Economic and Social Affairs (having to do particularly with the interests of the U N Council of that name), (3) Dependent Area Affairs (concerned with the activities of the U N Trusteeship Council), and (4) International Administration and Conferences As the Department's focal agency for U N relations, the Bureau of United Nations Affairs and its branches are expected to serve as the main channel between the Department and U N organs and agencies, to keep informed on all U N business and on the general state of international affairs, to make information available to all branches of the government concerned and to the general public, to review U N procedures and offer suggestions for improving them, and in general to promote the development of United States policies and programs pertaining to the peaceful settlement of international controversies It is hardly necessary to add that, like all Department operations, these and other functions are performed in the name of, and subject to control by, the president

(c) Representation at U N headquarters

For purposes of representation at U N headquarters in New York City, there is—as in the case of 47 other member nations—a "permanent mission," which with us consists chiefly of a representative" or chief of mission (from the beginning, ex-Senator Warren R Austin), a deputy representative to the Security Council, and representatives to the Economic and Social Council, the Trusteeship Council, and other organs and agencies, the whole staffed w

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nates, with the secretary of state serving as "senior representative") for each meeting Under terms of the United Nations Participation Act of 1945, the president reports in full to Congress every year on U N activities and on United States participation therein

3 Official and popular attitudes

Confronted with a world still in sad disorder, burdened with getting and keeping Western Europe on its feet, manifestly fated by superior wealth and power to spearhead the defense of the West against Russian aggression, and acutely aware of the new insecurity created by the atomic bomb, the United States views the United Nations with mingled hope and disappointment—hope because within the limited period of its existence the organization has addressed itself earnestly to its great task and in certain fields and situations

has established a record of achievement,[6] disappointment because of the organization's inability to end or alleviate the Russian "cold war" and its failure to attain universal membership, to bring about international control of the use of atomic energy, to organize until very lately any standing armed force to repress aggression (the force used in Korea in 1950-51 had to be improvised for the occasion), to make headway toward disarmament by individual nations, and to do other things thus far rendered impossible by lack of great power agreement and especially by blockades interposed by Soviet vetoes

On the other hand our government continues to express faith in the organization to take a leading part in it, and to give it loyal support,[7] at the same time, it does not hesitate to plan and carry out independent measures like the Marshall Plan, or measures in concert with more limited groups of nations, such as the North Atlantic states, for attaining purposes which *in some cases U N itself was created to attain* Whether because of preconceived ideas or of disgust with discords and weaknesses displayed there still are isolationists" who totally discount U N and any conceivable similar international device At the other extreme are people who, almost equally skeptical concerning U N, believe that no genuine advance toward world security is possible until we have world government—in effect adding a fourth governmental level to the three we in the United States already have Between are probably the majority of Americans, regarding isolation as dangerous even if any longer possible, world government as merely a 'castle in the air,' and U N —especially as now supplemented by regional organizations soon to be mentioned—as the best insurance against disaster that we have, or are likely to get, outside of our own independent defenses

## RESISTANCE TO COMMUNIST AGGRESSION

Not "one world" but two

Amid the experiences of World War II, many thinking people, impressed with the technological annihilation of distance and the resulting close contacts of peoples everywhere, became enamored of the concept of a future in which there would be but "one world," so knit together by moral, economic, and even political, ties that the follies and disasters of the past might in future be completely averted, and to a considerable extent, the United Nations, as planned, reflected such aspiration The unhappy outcome has instead, however, been a profound cleavage between *two* worlds—a sharp polarization of interests, policies, and power between a *bloc* of "free' nations, mainly in Western Europe and the Americas, and the U S S R and a group of Communist controlled satellite border states in Eastern and Central Europe and in Asia, including 'Red" China

When the U S S R absorbed three Baltic states—Lithuania, Estonia and Latvia—in 1940, there were misgivings in this country, and our government

[6] Relating principally to social betterment but also including political matters in areas like Iran Kashmir Palestine Indonesia at times Berlin and of course including the military intervention in Korea

[7] Including bearing the largest share of its cost To the total U N budget for 1950 the United States contributed $42 1 million or 39 79 per cent

never has recognized those annexations But for more than three years the Soviet Union fought as one of the allies against the Axis powers it participated in planning and establishing U N and became a top ranking member, and from Anglo American-Russian agreements, notably at the unfortunate Yalta conference of 1945, it derived large territorial and other gains Hardly was the war over, however, before the former ally shifted to a policy of coldly calculated non cooperation and aggression Continuing inside U N it nevertheless has repeatedly blocked needed action by arbitrary vetoes in the Security Council,[8] and several times has 'walked out" when displeased, as for example early in 1950 in protest against further representation of Nationalist China It has communized Poland, Hungary, Romania, Yugoslavia, Albania, Bulgaria, and Czechoslovakia and drawn them into its orbit, seriously threatened Greece, Turkey, Iran, and other Near Eastern states, brought border Asiatic areas under control, backed the communizing of almost all of China, and unquestionably encouraged and assisted, if not directly instigated, the North Korean assault on the (South) Korean Republic in 1950 With 750 million people (one-third of the earth's population) already herded under Soviet imperialism, further objectives, too, embrace the ideological, and even physical, conquest of Southeast Asia, India, all Western Europe, in time the world Charging the United States, Great Britain and other Western nations with 'war hysteria" preparatory to attack on the Soviet Union, Moscow isolates itself behind the 'Iron Curtain' as a world apart, obstructs long delayed peace settlements with former Axis powers, builds armaments and vetoes all proposals for bringing the strength of existing competitive armaments into the open, refuses to cooperate in plans for confining atomic energy to peaceful uses, and in general blocks the security which other nations and peoples so ardently covet Two worlds could not well be set over against each other more sharply and implacably than today's East and West

USSR aggression and intransigence

For the United States, as for other peace loving nations, all this has been deeply disappointing and challenging, and policies have of necessity been reoriented accordingly Direct diplomatic relations with the U S S R have continued, special missions have visited Moscow in hope of ameliorating the situation, conciliatory tactics have been employed in so far as self respect and considerations of safety permitted But all to no avail, and the conclusion has been forced that American and world security can be won only by methods which the makers of Soviet policy will understand and heed, namely, by sharply increasing our own military might (including preparation for atomic warfare if it cannot be averted), by developing U N 's latent military potentialities,[9] and by building supplementary regional defense systems—in short,

Significance for American foreign policy

power to *require*

[9] Under Art 43 of the Charter member states are required to place armed forces and facilities at the disposal of the U N Security Council for use in maintaining peace Until the Korean war of 1950 no state however had done this

by mobilizing the moral, economic, and military resources of the free world with sufficient vigor and effectiveness to "contain" Russian power, *i e*, to prevent it from overflowing its present bounds and extinguishing Western institutions and culture To this difficult and costly objective the over-all *foreign (and much domestic) policy of our government in the past four* or five years has been directed, and a few of the measures invoked—in addition to the rearmament program touched upon elsewhere—will now be discussed [10]

Devices for containing Russian power

A favorite method of the Kremlin for extending the sway of Communism *has been the promotion of revolutions, coups d'etat, and the like in border* or other near-by countries, upsetting existing governments and placing Communist regimes in power With Greece and Turkey in imminent danger, the United States in 1947 undertook, with an initial grant of $400 million by Congress, to save them by bolstering their economies and their capacity *for resistance with liberal aid in the form of money, goods, military supplies* and military counsel And, however important a factor such assistance may have been, the two states thus far have successfully withstood Communist pressures

1 Aid to Greece and Turkey

Meanwhile the 'Truman Doctrine" of fortifying war-torn nations against *Soviet seduction was extended to a vastly broader field* A "European Recovery Program' for supporting sagging economies throughout Western Europe became associated with the name of General George C Marshall, then secretary of state, and, warmly advocated by President Truman, was in the spring of 1948 implemented in an Economic Cooperation Act launching *appropriations regarded as likely eventually to mount as high as $17* billion in four years, and in varying degrees directly benefiting 16 European countries and China For managing the huge undertaking, an Economic Cooperation Administration (E C A ) was set up in Washington as an independent establishment, with appropriate machinery maintained also abroad And nations obtaining *industrial goods, agricultural commodities*, technical services, and other kinds of benefits bound themselves not only to refrain from passing on anything received to the U S S R or its satellites, but also to exert themselves to the utmost to strengthen their own economies, for of course the basic objective was a Western Europe sufficiently revived, prosperous, and stable to show little further susceptibility to Soviet blandishments Statistics reveal that from V J day (August 14, 1945) through fiscal 1951, the United States spent, in all, $42 6 billion on 28 different programs of foreign economic and military aid, with Marshall Plan grants accounting for somewhat over $11 billion

2 The 'Marshall Plan'

Results

Results are difficult to measure precisely But certainly Western Europe, with industrial production raised by a fourth above prewar levels, has been rendered more impervious to Soviet influence, useful outlets have been

[10] [illegible] in th [illegible] satelli [illegible] circle [illegible] cherished [illegible] f U N., and its [illegible] stration [illegible] till was [illegible]

provided for American agricultural and industrial products not needed at home, and experts undoubtedly are right in appraising the project as a whole as the most successful phase of our foreign policy and activity during the postwar years Under the original legislation, the Economic Cooperation Administration and spending under it were to end in June, 1952 Early in 1951, however, the Bureau of the Budget recommended to the President that, with other foreign commitments already made and doubtless still more to follow (whether or not through any formal extension of the Marshall Plan), the E C A , or something like it be continued as a more or less permanent independent arm of the government Most observers, indeed, agreed that, merely as a matter of self interest, the United States would have to go on laying out at least a billion a year for economic aid to Western Europe during the three or four years of the rearmament program, and the President, in May, 1951, asked Congress for some $1 6 billion to be used in fiscal year 1952 in expanding European production

*3 Regional defense pacts—the North Atlantic Treaty (1949)*

So long as consistent with its own purposes and principles, regional agreements and arrangements aimed at preserving peace are expressly sanctioned by the Charter of U N , and two of major importance involving the United States have come into existence (1) an Inter American Pact, built up in a series of conferences during 1940 48 and pledging all Western Hemisphere republics to regard an attack upon any of their number as an attack upon all and, in the event of such attack, to consult at once, although not necessarily to resort to war, and (2) a North Atlantic Pact signed at Washington in 1949 for 20 years and linking up for defense purposes 12 nations, large and small,[11] around the North Atlantic rim—all of the number undertaking to maintain and develop their own capacities to resist armed attack and agreeing to consult together when any one of the number is threatened, to regard an attack upon one or more in Europe or North America as an attack upon all, and in a contingency of the kind to take such action, individually and collectively (and with possible use of armed force) as may be considered necessary for maintaining the security of the North Atlantic area [12] In neither pact is the U S S R mentioned But both (and particularly the second) are clearly aimed defensively in its direction

Under plans developed in 1950 51, the supreme authority of the Atlantic Treaty nations is a *North Atlantic Council*, composed of the prime ministers (or any other ministers designated), with headquarters and various planning or operating boards in London, and an integrated armed force is to be maintained under command of General Dwight D Eisenhower, with military headquarters in Paris—a force gradually being assembled in 1951 One does not need to be told that participation in this project marks a sharp break

[11] ... Canada Great Britain France the Netherlands Belgium Luxembourg

[12] Both pacts mentioned (as well as others referred to in the next paragraph ...) steer around any invasion of the power of Congress to declare war Critical situations are to be met according to the constitutional processes of the various nations

with all previous United States policy—as also do (1) a mutual defense Pacific Pact signed on September 1 1951 at San Francisco by representatives of the United States Australia and New Zealand for consideration by their respective governments and (2) similar military alliances between the United States and Japan on the one hand and the Philippine Republic on the other signed at about the same time

3 oreign m l tary ss stance

Underlying the North Atlantic Pact is the idea that with the Communist threat steadily mounting the defensive military strength of the contracting 12 nations and indeed of the entire free world (dangerously deficient in many areas) must be raised to far higher levels and from the outset nothing was clearer than that much assistance to this end would have to come from the United States No sooner indeed was the Pact assured than an extensive program of American military aid was placed before Congress which started off by passing a Mutual Defense Assistance Act carrying an appropriation of $1 3 billion for fiscal 1950 mainly for Atlantic Pact states, and in the autumn of 1950 the resulting stream of arms military equipment and materials machine tools and technical assistance began flowing to all of the Pact nations requesting assistance and promising to use it exclusively for the intended purposes This of course was only a beginning In June 1950 an extension act appropriated $1 2 billion more for fiscal 1951 two months later (with war going on in Korea) President Truman asked for and obtained an additional $4 billion ($3 5 of the sum for the North Atlantic states) in his budget message of January 15 1951 he served notice that for fiscal 1952 he would request $9 7 billion "for mutual security programs chiefly aid to Atlantic Treaty states in continuing their build up of defense forces and equipment and four months later a direct request for $8 5 billion reached Capitol Hill with $6 25 billion of the sum earmarked for military items In later stages of the Marshall Plan there was a good deal of dovetailing of economic and military assistance (of the billions just mentioned about one quarter was intended for E C A use in promoting expanded production) Because of this and because of dissatisfaction with existing procedures the Congress in 1951 abolished the E C A and consolidated its economic rehabilitation program with the military assistance program in a new Mutual Security Agency in the Executive Office of the President For the programs entrusted to this new agency the Congress appropriated for fiscal 1952 in excess of $7 billion It thus became clear that for strictly military aid alone over a period of years outlays would mount considerably above E C A s stupendous economic disbursements From Moscow the entire undertaking was from the first denounced as an arming of Western Europe for aggression against the U S S R

5 "Po nt Four" and un derde veloped areas

In a notable 'Point Four of his inaugural address of January 20 1949 President Truman called for a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas Broadly viewed such areas of backward condition—mostly in Africa and the Near and Middle East but also embracing much of Central and South America—comprise half of the

earth's land surface and contain over a billion (some 46 per cent) of its inhabitants, and the general idea is to encourage and assist regions, in the assurance that whatever contributes to conditions favorable to peace, plenty, enlightenment, and freedom in any quarter of the world tends to minimize the discontent on which Soviet propaganda thrives If seriously embarked upon, the undertaking will be stupendous And it at least has advanced so far that U N has recommended it to constituent nations and sponsored significant preparatory regional researches, in 1950, Congress appropriated $26 9 million for exploratory surveys, an International Development Advisory Board, in a challenging report of the spring of 1951,[13] recommended policies and procedures calling for an outlay of over $2 billion, and by March, 1950, Point Four agreements had been concluded with 22 states in the world's less developed areas Some public expenditure will, of course, be entailed But, recognizing that the world's taxpayers already are overburdened, promoters of the project envisage it as carried forward under government coordination (perhaps through a Technical Cooperation Administration already set up in the Department of State), but mainly with private capital under private management, with profits for investors supplying a chief impetus The great problem is that of organizing concerted and sustained effort, together with insuring risk capital against local hazards of confiscatory taxation and nationalization

## KOREAN WAR AND THE "GREAT DEBATE"

Communist aggression against South Korea

In one area thus far, i e Korea, the policy of Russian "containment" has involved the United States—as also the United Nations for the first time—in actual war During World War II, the United States, Great Britain, China, and near the close the U S S R, pledged that after the country's liberation from Japanese rule, Korea would again become a free, united, and independent nation When Japan accepted defeat, it became a matter of convenience for Russian authorities to receive the surrender of Japanese forces in the Korean north and American authorities that of forces in the south, and for the purpose an arbitrary dividing line was fixed at the 38th parallel Before long, it became apparent that, quite contrary to American intention, the U S S R proposed to perpetuate the division, and although Russian troops were alleged to have been withdrawn from the northern zone in 1948, every effort of the United States, supported by associates in the late war, to bring about the creation of a free government for a united Korea was frustrated In the north, converted to Communism by Soviet propaganda, a well-armed puppet Communist regime—the "Democratic People's Republic of Korea"—arose under encouragement and effective domination from Moscow, in the south, a Republic of Korea was established as an independent nation in 1948 after a free election held under the auspices of the United Nations—a republic promptly recognized by the United States and 31 other U N members, although barred by Soviet veto from U N membership on its own part With

[13] *Partners in Progress* (New York 1951)

the northern Communist regime from the first claiming jurisdiction over the entire country, there always was danger that it would attempt by force to make its asserted authority good, and on June 25, 1950, a military assault across the 38th parallel was launched with that end in view A seven-man United Nations commission concluding investigations in the country at the time testified—as was well known from other sources—that the attack was entirely unprovoked and unjustified, and, prompted by the United States (through the president, with Congress not consulted) the U N Security Council immediately took notice of it, demanded an immediate cessation of hostilities, asked all U N members to refrain from aiding the aggressors, and as the situation grew worse, called upon all to assist the United States in repelling the invasion [14] Fifty-three of the then 59 U N members joined in condemning the North Koreans' action, and in time 41 of the number pledged assistance in stopping it

Inconclusive war

The military operations that ensued proved far more prolonged, difficult, and costly than originally expected With encouragement, or at all events no discouragement, from both the U S S R and Communist China, the invaders overran almost the whole of the South Korean territory South Korea itself was not well organized or equipped for defense, the United States had withdrawn its occupying forces from the country in 1949, and for a time, poorly armed Koreans and handfuls of unprepared American occupation troops brought over from Japan could only fight delaying actions, with danger of being pushed into the sea Continued calls of the United Nations upon its members, however, brought moral support and considerable naval and air, with some ground, assistance, by order of President Truman, armed forces began to be transported from the United States and put into heavy action, under U N authorization, the United States placed General Douglas MacArthur, commander in chief of United States forces in the Far East, in command, and in three months the invaders were rolled back to the 38th parallel, and eventually beyond With full vindication of U N authority apparently in sight, Communist China, however, in November, 1950, completely changed the picture by throwing forces into the conflict on the North Korean side, and during ensuing months of renewed conflict the fortunes of the U N cause waxed and waned as Communist hordes alternately recovered lost ground and were pushed back again

Questions of policy for the United States

Although officially a U N "police action," the Korean conflict proved primarily an American war, the United States was expressly commissioned by U N to repel the aggression, with assistance from other members, American soldiers bore the brunt of the fighting, [15] American taxpayers shouldered the bulk of the cost Demonstration that international Communism had reached the point of willingness to employ armed force to gain its ends

[14] This action was possible only because the U.S.S.R. was at the time boycotting the Security Council in protest against that body's unwillingness to admit Communist China to representation

[15] In May 1950, the United States had a force of 250 000 men in Korea 13 other U N members combined forces of only 35 000

suggested that perhaps an attempted all-out conquest of the free world was about to begin, and from this sprang not only American decision to embark upon another huge preparedness effort, but American initiative and leadership in building up the defenses of the other free peoples—all in a belated attempt to undo the error of the Western powers in disarming after World War II while the Soviets and their satellites were preparing for more war and conquest.

1. The "Great Debate"

Out of the new situation arose also a question of American national policy transcending any recently confronted. Assuming further Communist aggression—perhaps global assault—what strategy should the United States adopt, either in concert with U.N. or independently? Two main proposals were offered. One reflected the Truman Administration's policy of (1) concentrating on strengthening Western Europe as a bastion that must at all costs be saved if we were not ourselves to risk being overwhelmed, (2) contributing at once to General Eisenhower's North Atlantic army four divisions of troops, in addition to two already on European soil, as a token that we would fight in Europe if necessary, and (3) systematically encouraging and helping our European friends, in full belief that subjugation of their countries was the Kremlin's next great objective, from which it would not be diverted by minor operations like those in Korea. The second proposal, identified particularly with the name of ex-President Herbert Hoover and supported (in differing degrees) by a considerable segment of the Republican party, proceeded from affirmation (1) that, despite our assistance, Western Europe had not achieved the unity and resolution necessary to any great effort in its own defense, and (2) that, on the basis of the Korean experience, U.N. could not be relied upon to muster impressive military strength other than American. And from this, those of such opinion advanced to the conclusions (1) that, so far as an irresolute Europe was concerned, the United States should merely maintain an attitude of watchful waiting, pending a stiffening of will and purpose, (2) that the Western Hemisphere alone should be defended, as the "Gibraltar of Western civilization", (3) that to this end the Atlantic and Pacific Oceans should be firmly held together with the island outposts of Britain, Japan, Formosa, and the Philippines, and (4) that, far from committing vast land contingents against invading hordes in Europe, the United States should rely almost entirely on air and naval forces armed to the teeth. With prompt dispatching of four divisions of land troops to Europe as the immediate issue (and along with it the constitutional question of the right of the president to send troops abroad without action by Congress), the two contrasting programs, during the spring of 1951, precipitated prolonged and animated discussions in Congress, press, and popular circles meriting the term often applied to them, "the Great Debate." Over able and determined opposition, the Administration's program finally prevailed, with congressional assent the four divisions were dispatched, the proposal to retreat from defense of the free world to defense of an "American Gibraltar" was rejected, and with bipartisan support in Congress, the policy of building up defensive strength in every possible quarter was continued.

2 The Far Eastern angle

No more, however, was this settled than, in an atmosphere already heavy with bitterness another storm was raised by President Truman's action in recalling General MacArthur from his command on a charge of unwillingness to be guided by the policies of the United States and the U N in the Far Eastern situation The basic issue—in effect presenting a third alternative to the two policies mentioned—was between (1) MacArthur's desire to press war on Communist China as a means of pushing the Korean affair to a speedy and economical conclusion, and (2) the preference at Washington and in the U N for avoiding such risk of bringing the U S S R actively upon the scene and precipitating World War III The General believed World War III in effect already begun, with the Far East as the Communists' chosen field for it, his opponents thought Europe the prime Soviet target and argued not only that there still was a fair chance for averting global war entirely by a sufficient build up of allied strength, but that the Kremlin would like nothing better than to see the West become heavily committed (and perhaps bogged down) in the East leaving Russia free to move into the resulting West European vacuum MacArthur forcefully presented his case in speeches before Congress and throughout the country, President Truman took to the air in reply, and a prolonged public joint investigation by the Senate foreign relations and armed services committees, in which our diplomatic and military strategy was published to the world in a fashion never before known in any nation, failed to change firmly held opinions on either side of the controversy, but left intact the Administration s restricted Far Eastern purpose of halting aggression in Korea and then seeking a negotiated peace, with the soil of Communist China still untouched As already determined Western Europe still was to be the focal area of U S -U N defense interest and action, with global war thought most likely to be averted by defenses there, or, if started, most usefully to be met and checked there [16]

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# CHAPTER 33

## National Defense

*Once a casual interest*

Early resolution to keep out of Europe's wars did not save us as a nation from a threatened conflict with France in 1800 or an actual one with Great Britain in 1812 Nevertheless, by acquiring Louisiana and Florida we soon eliminated France and Spain as potential troublemakers on our borders, after the final defeat of Napoleon, affairs abroad took a more peaceful turn, and for over 100 years we enjoyed a comfortable sense of national isolation and security Wars with Mexico and Spain carried no serious threat, and although in 1917 we were drawn into the greatest armed conflict that the world of that time had known, we came off still effectively sheltered, as we thought, by the broad oceans washing our shores In days which persons of only middle age can well remember, our Army was extremely small, our Navy better developed but not top flight, and the national temper so averse to militarism that impressive defenses hardly could be maintained at all

*Now a paramount corcern*

Then dawned a period of great change International turmoil gripped the world, technological developments left us no longer protected by geography, mechanized global war advanced in our direction and finally in 1941 overtook us, by rapid stages, defense, long a matter of only sporadic interest, became our paramount national concern—and defense no longer confined to prudent preparedness, but actualized in deadly combat on land and sea and in the air in every quarter of the globe And this time there was no lapsing back into an easy feeling of security after the fighting was over As after World War I, new international machinery was set up to prevent such things happening again But there had been failure before, and might be this time too Besides, an ominous 'cold war with the world's other principal power, the U S S R , might at any time grow 'hot", the new 'absolute weapon" of atomic power, although as yet used only by ourselves, might presently be turned against us, in wars of the future, distance would mean little or nothing In short, with a great victory just won, the country had never been in so exposed a position or so much in need of measures for protecting itself In this situation, defense continued a topmost concern Swollen national budgets of four "peacetime" years devoted one dollar out of every three to promoting it, and when, in 1950, a surprise Communist assault upon the Korean Republic brought upon us undeclared but difficult and costly war, we quickly found ourselves back in the atmosphere of 1940 41—doubling or tripling military

appropriations, increasing taxes, conscripting troops, imposing economic controls and in other ways girding for an all out international conflict if it should come, while at the same time by the same effort (it was hoped) preventing it from coming All indications are that for quite a period defense, i e, "security," under a war or semi war economy, will predominate among our national interests

## SOME CONSTITUTIONAL PRINCIPLES

During the Revolution and the ensuing "critical period," lack of power of Congress to mobilize the fighting strength and material resources of the country with full effectiveness and to deal promptly and decisively with domestic disorders, gravely imperiled the beginnings of the nation, and the experience put the makers of the constitution in a frame of mind to apply strong remedies Into the new fundamental law they therefore wrote upwards of a dozen provisions[1] which, taken together, provided every power at that time deemed necessary for defending the country, whether against Indian depredations, domestic uprising, or foreign attack Two principles of the resulting defense system require mention at the outset

1 Defense a national responsibility

To start with, full responsibility for defense was placed where it remains today, i e, in the national government The states, it is true, may and do maintain militia for use in enforcing their own proper authority But unless Congress gives permission, they may not 'keep troops or ships of war in time of peace or engage in war unless actually invaded or in such imminent danger as will not admit of delay"[2] Even the state militia may be called into the service of the United States thereupon passing under supreme command of the president, and the military establishments of the states have in later days, under the name of the National Guard, become an integral part of the war machine of the nation In time of defense emergency, and especially of war, counties, cities, and other jurisdictions collaborate with the national government in a multitude of ways Their services, however, are merely phases of an over-all national effort, and full responsibility for that effort rests with the government at Washington

2 Civil authority supreme over military

A second principle is equally fundamental While solicitous about providing for defense, the framers of the constitution had no desire to open a way for an overshadowing, and perhaps overweening, military establishment, or for the rise of military dictatorship True, they did not expressly enjoin in the document—as is done in all of the state constitutions except that of New York—that the military establishment shall in all matters be subject to civil control But they achieved the same end by so defining the defense and war powers of Congress and the president (civil branches of the government) as to set up all possible safeguards against military domination Congress alone can raise and support armies, make rules for governing them, and declare war, the president is commander in chief of all armed forces, whether in peace or in

[1] At least seven in Art I § 8 alone
[2] Art I, § 10 cl 3

war, the secretary of defense must by law be a civilian,[3] and firmly established practice makes the same requirement of the heads of the now subordinate Army Navy and Air Force Departments When, early in 1951, President Truman summarily removed General Douglas MacArthur from his command in the Far East for unwillingness to be guided by the Administration's policy concerning military operations in Korea, the principle of civil supremacy received new and dramatic emphasis The action provoked a storm of protest and controversy but no one could deny the President's full constitutional right to take it

Within the framework of the foregoing principles the constitution divides defense functions and powers between Congress and the president, and the resulting pattern requires some comment

## DEFENSE FUNCTIONS AND POWERS OF CONGRESS

*1 Providing for the armed services*

To start with Congress has sole power to "raise and support armies" and to "provide and maintain a navy" [4] And these things it does under the leadership of strong standing committees on the armed services in the two houses and by specifying the number and kinds of troops to be enlisted, prescribing the method of recruitment (including conscription), fixing scales of pay authorizing the building and manning of war craft, providing for auxiliary equipment such as forts, arsenals, and dock-yards, and of course by raising and appropriating money for the military, naval, and air establishments subject to the constitutional restriction that no appropriation for raising and supporting armies may be made for a longer period than two years [5] Closely related, too is the power to 'provide for arming and disciplining the militia and for calling into federal service any and all portions thereof as needed for defense on home or foreign ground Authority is at no point lacking for providing the fighting forces, funds, and equipment considered necessary to safeguard the nation in time of peace and to insure vigorous and effective prosecution of hostilities in time of war

*2 Enacting military and naval regulations*

In the second place Congress has unrestricted authority to make "rules for the government and regulation of the land and naval forces," and also 'rules concerning captures on land and water " [6] Resulting "Articles of War for the Army and 'Articles for the Government of the Navy" long were separate and subject to criticism not only for their lack of uniformity but for harsh features of the system of military justice for which they provided Experience during World War II led to general revision by a committee of experts, and in 1950 Congress enacted a new consolidated code, uniform for all of the armed services, and entitled 'Military Laws of the United States "

[3] The National Security Act of 1947 expressly prohibits the appointment as secretary of

rule for the one occasion only

[4] Art I § 8 cls 12 13

[5] Art I § 8 cls 12

[6] Art I § 8 cls 11 14

Congress alone can declare war,[7] the usual method being a joint resolution requested and afterwards signed by the president Sometimes, however, the discretion implied is more theoretical than actual, for (1) as in the case of war in 1941 with Japan, hostilities may be forced upon us, even with an element of surprise, by aggressive action of a foreign power, leaving us no alternative, (2) in conducting foreign relations, the president may bring the country to a point where no honorable course other than war remains, and (3) we may be drawn into armed operations, as in Korea in 1950, in fulfillment of our obligations as a member of U N , with no war "declared," at all events by Congress In the first of these situations, with hostilities started, Congress invariably declares a 'state of war,' fixing an exact date from which the rights and liabilities incident to war are to be reckoned [8] In the second, the two houses may, however regretfully, declare a war that cannot be avoided without stultification In the third, hostilities presumably must be accepted and supported, whether they be officially termed "war" or only, as in Korea *in 1950-51, an armed "police" operation Needless to say, the possibility* of such involvement, entailing all the burdens and consequences of war, yet with the power of Congress to decide and "declare" bypassed, was a feature of the U N Charter not easy for the Senate to accept, and, as indicated elsewhere, all regional defense pacts to which the United States now is a party—*Inter American, North Atlantic and Pacific (with Australia and New Zealand)* —while requiring signatories, in case of attack upon any of their number, to consult and to take individual or collective action, have been so drawn as to leave the United States (and every other signatory) free to invoke or not invoke military force, and therefore Congress at least legally free to declare war or not as it may choose—even though *moral obligation to do so may*, and usually will, be very strong Certainly there would not be much point to supplying military divisions for the army of the Atlantic Treaty Nations commanded by General Eisenhower unless they could be used in repelling any assault upon Western Europe by Soviet forces

3 Declaring war

There was a time when, except in case of invasion, war was of no great concern to the general mass of the people Armies were volunteer, taxes indirect, supplies bought in the open market, sacrifice and morale demanded chiefly of the forces in the field The vast scale on which the mechanized wars of today are waged, however, make them hardly less of civilian than of military concern When war comes or is imminently *threatened*, it is, as President Wilson remarked in 1917, 'not an army that we must shape and train, it is a nation " And experience gained both during World War I and in connection with the stupendous defense effort launched in 1940 and merging into the war effort of succeeding years—not to mention the rearmament pro-

4 Mobilizing the nation for war effort

[7] Art I, § 8, cl 11

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gram started in 1950—revealed in startling manner the lengths to which Congress may go in reorganizing and regimenting the national life for purposes of successful prosecution of, or even simply preparation for, war under twentieth century conditions The president independently enjoys war powers of impressive magnitude To Congress, however, it falls, not only to provide the necessary men and money, but to endow the chief executive with whatever authority he may lack for turning industry, commerce, transportation, communications, and even science and education, into channels likely to contribute most adequately to successful national effort The method commonly is that of legislation delegating extraordinary powers for the duration of the war (or other designated period), either with or without creation by Congress of new machinery for exercising them In each field covered, the resulting system of controls is organized and administered by the executive branch But the underlying authority comes from Congress, and while the courts often have looked with disfavor upon delegations of power by one branch of the government to another, developments during the two world wars indicate that under wartime stress and excitement Congress can go practically as far as it likes with such grants

## DEFENSE FUNCTIONS AND POWERS OF THE PRESIDENT

Sources of authority

The authority of Congress manifestly underlies our entire system of national defense, without it there would be no army or navy, no money, and only imperfect means of mobilizing the nation for a defense or war effort The central figure in defense, and especially in the conduct of war, is nevertheless the president, with powers accruing in this capacity from three main sources (1) his constitutional status as chief executive, (2) his constitutional rôle also as commander in chief, and (3) grants, or "delegations," by Congress During its three great wars of the last hundred years, the nation was fortunate enough to have in the White House chief executives—Lincoln, Wilson, and Franklin D Roosevelt—who would have loomed large in history in any event All gained additional stature from guiding the country's destinies amid a supreme war effort, all are thought of primarily as "war presidents" Every president, however, has significant defense powers and functions whether war crosses his pathway or not

1 Position as chief executive and commander in-chief

What defense authority comes to the president from being chief executive and what from being commander-in chief is not easy to say, in practice, if not constitutionally, the two functions are incapable of being completely disentangled Various powers however clearly derive from the status of chief executive Certainly nothing beyond this is required for authority to appoint regular and reserve officers of the armed forces, to supervise and direct the Department of Defense and under it the subordinate "military departments" of the Army, Navy, and Air Force, to enforce military and naval regulations laid down by Congress and to supplement them, within constitutional limits, with others of his own, to initiate and approve or to veto general legislation on defense subjects, to present budgets providing

for military, naval, and air expenditures, and to employ armed force, when necessary, in seeing that the laws are faithfully executed and in protecting the states (on call from legislature or governor) from domestic violence On the other hand, it is equally certain that being commander in chief adds something *much* indeed, although precisely *how much* it would be difficult to say, and undoubtedly more in wartime than in peacetime What it means to be commander in chief, the constitution does not specify, and no definition has been supplied by either Congress or the courts We know only that, taken in conjunction with powers as chief executive, and viewed in the light of what has actually happened in our major wars prerogatives as commander in chief go far toward raising the president in wartime to a pinnacle unmatched in any democratic country

2 Grants by Congress

Congress, as already observed supplies the money and the men, the president, as chief executive and commander in chief, uses them, largely at his discretion Congress also however confers powers, even though not always with much discrimination as to whether upon chief executive or upon commander-in chief Occasionally such grants take the form of liberating the president from restrictions which Congress itself has imposed, as for example when, after Pearl Harbor authority was given to employ the National Guard and recruits under Selective Service anywhere in the world, instead of simply in the Western Hemisphere and in American overseas possessions More often, however (at least during peak defense efforts), grants involve the delegation of vast new discretionary authority to deal with broadly defined substantive fields—military recruiting war production, transportation, communications, food and fuel control prices, and what not—in furtherance of objectives also broadly defined In every war in our history, especially the later and greater ones, the president has been found making many and large requests of the legislative branch, with the two houses sometimes hesitating and delaying, but almost always in the end complying through statutes of appropriate scope and vigor

The president and the beginning of war

What of the president's relation to the beginning of war, and his scope of authority once war has commenced? To start with, in handling relations abroad he may, as pointed out earlier, create a situation making war virtually inevitable In the course of stormy negotiations with Mexico in 1846, President Polk ordered American troops to advance into territory then in dispute with that country The Mexican authorities had made it plain that such a step would be regarded as an act of war, and the soldiers were promptly fired upon Polk then said that war existed by act of Mexico and Congress proceeded to 'declare' it President McKinley ordered the battleship *Maine* to Havana harbor in 1898, notwithstanding that the Spaniards were certain to regard the act as unfriendly The vessel was blown up, and the Spanish American War followed By his handling of relations with Berlin after the sinking of the *Lusitania* in 1915, President Wilson brought the United States to a situation where the only alternative to a declaration of war upon Germany would have been national abasement And more recently, the whole course of policy and action which, over a period of years, led the United States straight to involvement in

World War II, while sustained by increasing evidences of popular support was projected and carried forward under the sole ultimate responsibility of President Franklin D Roosevelt Technically, the conflict in Korea starting in 1950 was not a war, and Congress never "declared" it Certainly, however, it was a war in fact, and we entered it solely on President Truman's initiative in prompting the United Nations to offer instant armed resistance to overt Communist aggression Congress could, if it liked, declare a war to which the president was opposed and he could attempt to avert it by interposing a veto With the possible exception of the War of 1812, however, all of our wars have been entered upon in pursuance of presidential policies and decisions, and every joint resolution declaring war has been at presidential request

The president in war time

In peaceful times such as the country once knew, the president's defense functions amount to hardly more than the same general leadership and supervision as in other fields "Peace' of the sort experienced in many recent years however, entails activities and anxieties scarcely less exacting than those in war There are defense policies to be determined, defense preparations to be made, defense interests to be protected both at home and abroad Certainly nothing makes heavier demands upon a chief executive situated as President Truman has been in years of only nominal peace

It is, nevertheless, when war comes, on a large scale, that the president rises to the full stature implicit in the sources and forms of authority above described Subject to restrictions by Congress (which almost certainly would not be imposed in the midst of conflict), he can send all branches of the armed forces anywhere that he chooses, and use them as he desires [9] He can take as much part as he likes in mapping out strategy and directing campaigns, indeed there is nothing to prevent him from taking the field in person if he so desires, except, of course, that as a civilian, he would be an amateur—even if he were not pressed to the limit with tasks more properly within his province Like any other supreme commander he can terminate hostilities by agreeing to an armistice He can set up military governments in conquered territory, and, directly or through appointed agents, exercise all executive powers there, and all legislative powers as well until Congress makes different arrangements Meanwhile, availing himself of broad grants of emergency authority already on the statute book (even though perhaps long dormant), or voted by Congress in response to White House requests unfailingly made, he can carry out sweeping programs of armed recruitment, civilian mobilization, and economic controls,

[9] Central to the "Great Debate" of the winter of 1950-51 on defense policy (see p 523 above) was the question of whether the president would be constitutionally entitled to send armed divisions to Europe in peacetime and without express congressional sanction for service in the North Atlantic army Reflecting the opinion of most constitutional authorities the conclusion was that, as commander in-chief and endowed with special responsibilities in the field of foreign affairs he was to be regarded as possessing such power In fact it was brought out that since 1789 there had been no fewer than 125 occasions on which the president in peacetime and with no prior action by Congress had ordered armed forces to take action or maintain positions abroad In none however were the implications so grave as in the matter of the North Atlantic army and on that subject Congress not only acted—assenting to dispatch of four divisions (to be added to two already on European soil and numbering in all some 344,000 men)—but while holding back from positively forbidding more than the six divisions to be committed in the same way plainly indicated that on such matters in the future it would expect to be consulted

authorize or issue multitudes of administrative regulations, reorganize governmental agencies and create new ones, take over plants in which labor stoppages are interfering with war production or the railroads if transportation difficulties are impeding the war effort, and do such a multitude of other things that the sum total of authority amassed and exercised almost defies comprehension. Indeed, the object in war being to discover and make effective all national potentialities as speedily as possible, and at the same time to break down the enemy's capacity for resistance, control over the use of the armed forces inevitably broadens into the general function of taking whatever measures may be found necessary to those ends. As a former secretary of war phrased it, the commander-in chief's duty is nothing less than to prosecute a war "to the fullest extent." In discharging this responsibility, he, of course, must not violate the constitution or the laws, and, to a degree, he must work in cooperation with Congress, from which much of his high authority has come and to which much of it will return. Outside of these limitations, however, he and his advisers, civil and military, have, and must have, practically a free hand.

Lincoln, Wilson and Roosevel

During the Civil War, President Lincoln relied heavily on what he understood to be his prerogatives as commander-in-chief and, although receiving substantial grants of authority from Congress, developed and exercised unprecedented war powers largely on his own initiative and responsibility. Sometimes he later sought validation from the legislative branch, which in most instances was forthcoming, although not in all; frequently he was charged with being a "dictator." During World War I, President Wilson wielded even greater power, but with the difference that (although far from oblivious to his rights as commander in-chief) he habitually sought and obtained from Congress advance grants of authority deemed necessary for his purposes. In World War II, President Roosevelt predominantly followed the Wilsonian pattern, yet with so keen a sense of the justification, and indeed necessity, in wartime of large concentration of authority in the executive that one could never be sure how far he would pursue a line of action deemed essential, whether or not Congress gave its approval. His general disposition seemed to be to rely heavily on authority delegated by Congress, yet not to consider himself restrained, in the absence of such authority, from going to almost any lengths—if matters seemed urgent—under warrant solely of his constitutional prerogatives as commander in chief.

## ORGANIZATION FOR NATIONAL SECURITY

Former separate defense administrations and services

Until of late, defense organization in the United States was notoriously lacking in integration. At the top, the president as chief executive and commander in chief supplied a measure of unity. But the War (later Army) and Navy Departments were entirely separate, the armed services whose affairs they managed were not only separate, but often uncooperative and even antagonistic, in making appropriations and enacting defense legislation, Congress

rarely considered Army and Navy needs at the same time or in much relation to each other [10] In earlier and simpler days, the disadvantages of such disunity often were apparent, but usually not regarded as serious, and little was done toward overcoming them, we emerged from our wars successfully, and the country was satisfied Even World War I brought no significant change World War II, however, was different, not simply on account of its unprecedented magnitude and complexity, and its demonstration that for the attainment of objectives in such a conflict there must be a wholly new type of collaboration between land, sea, and air forces, but because of leaving us confronted with a world situation making it indispensable that we permanently maintain an armed establishment not only far larger than ever before in peacetime but organized and integrated for a maximum of efficiency at a minimum of what must in any case be stupendous cost

National Security Acts of 1947 and 1949

From far back, there had been intermittent proposals to merge the War and Navy Departments into some form of defense department, though later on the rapid development of air warfare had led some people to suggest moving in the opposite direction and setting up a separate department of military (and perhaps civilian) aviation World War II at last drove home the conviction not only that basic reorganization must no longer be delayed, but that it definitely must be in the direction of all round integration, and after two or three years of lively bickering between the Army and the Navy, with the latter holding back but the Truman Administration sturdily urging action, Congress eventually, in 1947, passed a National Security Act [11] providing for a more extensive defense reorganization than any in our previous history The defense set-up about to be outlined rests principally upon that significant piece of legislation, as amended in the direction of further coordination by a measure two years later entitled National Security Act Amendments of 1949 and stemming largely from urgent recommendations of the Hoover Commission [12] Experience indicates that, even yet, coordination has not gone as far as is desirable

1 The Department of Defense

(a) Origins

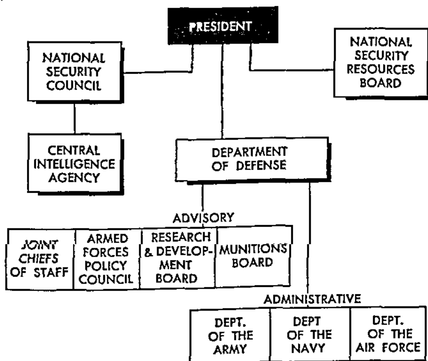
In line with the announced objective of "integrated policies and procedures for the departments, agencies and functions of the government relating to the national security,' the act of 1947 undertook to gather substantially everything into an administrative and advisory structure known as the National Security Organization, with a National Military Establishment as its core and a National Security Council and a National Security Resources Board on its periphery The National Military Establishment represented a major innovation, because its creation marked the first time that the previously separate War and Navy Departments ever had been linked up under any directive authority other than that of the president Since, however, the Departments named (with the War Department rechristened Department of the Army, and with a new Department of the Air Force added) retained most of their

[10] Until the Legislative Reorganization Act of 1946 substituted in each house a consolidated committee on the armed services there were separate military and naval committees in each

[11] 61 *U S Stat at Large* 495

[12] *The National Security Organization* (Washington D C, 1949)

previous autonomy, the change was more apparent than real To be sure, an entirely new official—a secretary of defense, appointed by the president and Senate, and with only civilians eligible—was introduced and charged with (1) establishing general policies and programs for the National Military Establishment and for all component departments and agencies, (2) exercising "general direction, authority, and control' over such departments and agencies, (3) discovering and eliminating unnecessary duplication or overlapping in their activities, and (4) advising with the departments and agencies in the preparation of their budgets and formulating a single unified military budget for consideration by the Budget Bureau, the president, and eventually Congress But the so called Establishment (largely a paper affair) was not in the nature of a true executive department, and the secretary of defense, although seated in the cabinet—as the heads of the three service departments were not—soon found himself possessed of prestige but little else Combined with the service departments' characteristic love of autonomy, the traditional fear lest one man be allowed too much power in military matters had operated to cause the secretary to be given too little, and in practice the 'general authority" over the department assigned him almost evaporated into nothingness



To remedy this unhappy situation became the principal function of the amending act of 1949 First of all, the somewhat ethereal National Military Establishment was discarded, and in its place was put a single full orbed executive department, the present Department of Defense—officially ranking second only to the Department of State In line with this, the secretary was given powers commensurate with those of other department heads—his principal remaining limitations being that he may not abolish any of the established functions of the Army, Navy, or Air Force or merge any portions of the armed services Logically enough, in view of their functions, the act also transferred the National Security Council and the National Security Resources Board to the Executive Office of the President

(b) The "military departments"

Finally, the legislation of 1949 definitely reduced the Departments of the Army, Navy, and Air Force to their present status of so-called "military departments" The Department of the Army is charged with responsibility for organizing, training, maintaining, and equipping the United States Army, and with various subsidiary functions such as directing the Corps of Engineers in improving waterways, formulating and executing plans for flood control, constructing national monuments and memorials, and supervising the management of the Canal Zone Aside from a now very limited amount of insular administration, the Navy Department has no functions not directly connected with the Navy itself, although these involve an extraordinary number of technical duties in addition to general administration Taking over many aëronautical functions from the Navy and former War Departments, the new Department of the Air Force already has developed extensive machinery concerned with substantially everything relating to not only the Regular Air Force, but an Air Reserve, an Air National Guard, and an Air Reserve Officers Training Corps All three departments undergo occasional organizational changes, but in general operate in ways not widely different from those familiar in the War and Navy establishments before 1947 All have the basic task of maintaining firm central and civilian control while promoting the military capacities and energies for which the respective—and still separate—armed forces under them exist

(c) Staff agencies

At the highest level, the Defense Department is rounded out by four staff agencies for planning and consultation Mere mention of these, however, must suffice (1) the Armed Forces Policy Council, composed of the principal civilian officers of the Department and constituting the top policy group, (2) the Joint Chiefs of Staff, consisting of the chiefs of staff of the Army and of the Air Force and the chief of Naval Operations, under a chairman (in 1951 General Omar N Bradley), and having as its province all matters pertaining to military strategy, (3) the Munitions Board, charged with planning all programs for procurement of military supplies, and therefore with all military aspects of industrial mobilization, and (4) the Research and Development Board, whose function is not directly to engage in research but to keep the secretary of defense informed on the status of all scientific investigation, public and private, having a bearing on defense, and to plan and advise on coordinated research programs

**2 The National Security Council**

With the secretary of defense supplying the principal point of contact, the Department of Defense is the arm of the president for purposes of national security in its more strictly military, naval, and aeronautical aspects. Other and broader aspects, however, are relevant, and to provide for these the National Security Act of 1947 introduced two further basic agencies already mentioned, *i.e.*, the National Security Council and the National Security Resources Board, both placed in 1949, as stated, in the Executive Office of the President. Of the two, the first is functionally the more fundamental, because its task is nothing less than to formulate for the president the collective advice of all appropriate officers and agencies of the executive branch on the integration of domestic, foreign, and military policies in any manner touching national security. In addition to the president as chairman, the members include the vice-president, the secretaries of state and defense, and the chairman of the National Security Resources Board, who from their different official environments can bring together foreign policy, military, and economic viewpoints, with indeed the financial also contributed by the secretary of the treasury sitting (as in the case of six other high officials), not strictly as a member, but as a regular participant by presidential invitation. Meeting in the White House normally once a week, the Council threshes out large questions of policy related to national security and through its executive secretary (one of the very few persons who sees the president virtually every day) keeps the chief executive currently informed on all its discussions and decisions. Technically, the Council does not itself determine policy. That is for the president to do, on the basis of Council advice, which, however, he is free to accept or reject, in whole or in part. But if one is looking for the instrumentality through which high-level correlation of the nation's foreign objectives, commitments, and risks with its military and economic capacities is achieved, he will find it—as the legislation of 1947 designs—in the National Security Council.

**3 The National Security Resources Board**

Success in war depends heavily upon a nation's economic preparedness, or at any rate upon the speed and effectiveness with which the economy can be converted to war production, and, deeply impressed by World War II experience at this point, the authors of the Security Act of 1947 provided in *the National Security Resources Board an investigative and planning organization* for correlating foreign and military policy with natural resources and economic capacity. Composed (in addition to a full time chairman appointed by the president and Senate) of heads or other representatives of appropriate departments or agencies designated from time to time by the president—in 1951, the secretaries of state, treasury, defense, interior, agriculture, commerce, and labor—and sustaining close working relations with the Department of Defense, the Security Council, the Council of Economic Advisers, and the Budget Bureau, this organization, too, determines no policies and exercises no operating functions, being instead purely advisory to the president, with all decisions made and enforced by him. But the range of its investigations and recommendations is extremely wide, embracing as it does strategic relocation of industries, stockpiling of strategic and critical

determination of potential requirements for and supplies of manpower, materials, and facilities, stabilization of the economy in wartime, and related matters, including (since 1949) civil defense planning In time of peace essentially a skeleton organization, in a major war the Board well might expand into something on the order of the towering War Production Board of World War II

## THE ARMED SERVICES

1 The Army

Throughout their history, the American people never have placed much emphasis on military organization and service except as now and then forced by circumstances, and they never have entered a major war militarily well prepared In particular, they have been disinclined to a large standing army The constitution, nevertheless, assumes some need for armed forces and empowers Congress to "raise and support armies", and from Washington's first administration to the present a national army of some kind always has existed As recently as 1939, effective strength stood at only 13,819 officers and 174,079 enlisted men [13] During World War II, a top strength of 8 3 million was attained Demobilization and lagging enlistments brought the figure down to 591,700 on June 30, 1950 (with the Korean crisis fresh in the news) The rearmament program then initiated raised it to some 1 4 million by 1951, with further increases projected [14]

Top level organization

Composed of officers and enlisted men (the latter volunteers or conscripts), the Army is organized in (1) six 'continental armies" (First, Second, Third, etc ), each under its own commanding general and attached to one of six army areas into which the country is divided, (2) a similar army for the Military District of Washington, and (3) various oversea commands The president, of course, is commander in chief, and for administrative and general advisory purposes, his right hand man is the secretary of defense, assisted by the secretary of the army, heading the now subordinate Army Department Each of the three armed services has its own chief of staff, acting as principal technical adviser to the civilian heads of his own department and the coordinating Department of Defense and likewise, within his province, to the president —although functioning also through the Joint Chiefs of Staff acting collectively Within his particular service, the chief also is in general charge of organization and coordination, both at home and abroad, with the work in the case of the Army carried on in detail largely by a board of high Army officers organized in five divisions and known as the Army Staff [15]

Traditional dislike for a standing army stemmed from apprehension lest troops with time on their hands become a tool of conspirators against the people's liberties No such fear ever was felt about a navy operating chiefly abroad and against external foes A navy of lofty traditions but of no great size therefore was maintained from the beginning first stirring considerable interest among the people by its exploits during the Spanish American War and first attaining impressive proportions during World War I, when, by 1918, with a powerful fleet afloat and new construction proceeding rapidly, the country found itself with the scepter of sea supremacy within its grasp Under international agreements, retrenchment followed With these agreements, however, collapsing in the middle thirties and the European and Asiatic skies becoming more clouded, rebuilding was started, new bases were acquired, and by the close of World War II the country not only far surpassed all others, even Great Britain, in naval strength, but was mistress of the seas in both great bordering oceans After 1945, ships were laid up or disposed of, and a peak wartime naval personnel of 3 7 million was reduced by 1950 to 380,000, besides 74,000 in the semi autonomous naval arm known as the Marine Corps [16] The country, nevertheless, still had almost double the naval tonnage of Great Britain—nearly a quarter more than all foreign nations combined, and while possible war with the U S S R and its satellites might put less strain on our naval power than did World War II, one cannot be too sure of this, and in any case naval recruitment and rehabilitation necessarily must be, and are, prominent in our current rearmament program [17] Operating a navy is very unlike operating an army In general, however, the lines of responsibility and control at the higher levels are not materially different Corresponding roughly, too, to the "area' armies mentioned above are the various fleets and other units into which naval forces are divided, and the high importance of the Army chief of staff attaches likewise to the Navy "chief of operations — a chief of staff under another name

2 The Navy

To the traditional Army Navy defense dualism, the present century has added a third primary element, *i e* the Air Force First significantly employed for military purposes in World War I, aircraft so captured the imagination of some students of warfare that armies and navies of the familiar pattern were envisaged as virtually outmoded, with future international conflicts expected to be decided in the air by bombers and fighters So great a revolution has not taken place Nevertheless, World War II saw tremendous expansion of airwar facilities and techniques, and at its close both the Army and the Navy had powerful air fleets in action With nothing clearer than that defense in an

3 The Air Force

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hardly calculated to insure the best possible selections since under the rules the young man

over again for naval use

[17] By April, 1951, Navy personnel was up to some 600 000

atomic age would become increasingly a matter of air power, the National Security Act of 1947 established an Air Force coordinate with the Army and Navy, and likewise an Air Force Department, under the Defense Department umbrella to administer it. The Army acceded to the arrangement with no serious misgivings. The Navy, however, felt differently and in the end succeeded in retaining such an air arm of its own that of late almost half of the annual naval appropriation has been spent upon it, while mutual distrust between the Air Force and the Navy has been one of the darker spots in our defense picture. Charged with defending the country against air attack, engaging in air warfare wherever required, providing combat support for ground and amphibious operations, and gaining and holding general air supremacy, the Air Force by mid 1950 numbered 408,000 officers and men, organized in 15 'commands'—11 operating in the United States and 4 overseas. It goes without saying that should atomic warfare become a reality, it would be principally air warfare, and national defense effort in progress since the Korean invasion embraces a further Air Force build-up of impressive proportions. Higher-level organization is in general similar to that in the other two services, with a chief of staff heading the list of officials in a United States Air Force Headquarters. A training academy for pilots comparable to the academies at West Point and Annapolis is contemplated.

4 Reserves

Each of the three services described is backed, to a limited extent, by an organized reserve, consisting of (1) persons who, after having been attached to a particular service, have returned to private life but still are subject to call when needed, as for example in 1940 and again in 1950, and (2) men who have had training in Reserve Officers Training Corps ("R O T C") units in colleges and universities, and likewise constituting a reservoir of officer material to be drawn upon as required. Retaining their commissions and ratings, former officers and enlisted men keep some touch with their respective services through meetings, extension courses, and even brief periods of actual duty.

5 National Guard

Still another resource is the organized militia. In common with English-speaking peoples everywhere, we long were opposed to any sizable army in time of peace, inclining rather, as a safeguard of freedom, to a volunteer citizen militia in each state with only such modest training and equipment as would enable it to cope with domestic disorder and to meet other relatively minor needs, and all states have such militia, even though nowadays linked up, in a manner that would have shocked our forbears, with the national defense establishment and bearing the significant name of National Guard.[18] State contingents of the National Guard still are primarily state instrumentalities, with (so long as not drawn into federal service) appointment of their officers and provision for their training expressly reserved to state authorities.

[18] Speaking strictly the militia includes under terms of a statute of 1898 all able-bodied male citizens (and aliens who have declared their intention to be naturalized) between the ages of 18 and 45 and all such are liable to perform military duty in the service of the United States." In ordinary usage however the term denotes only the armed establishments maintained by the states, i.e. the organized and trained portion of the militia embraced in the National Guard.

Congress, nevertheless, is authorized to "provide for arming and disciplining the militia," to provide for calling into federal service any and all portions of it required for executing the federal laws, for suppressing insurrections, or for repelling invasions, and to make rules for governing such forces when "employed in the service of the United States'[19] And in pursuance of these broad powers, Congress not only in an Army Organization Act of 1920, gave the president permanent authority to make use of the National Guard for emergency purposes, but has enacted numerous regulations aimed at increasing the establishment's effectiveness and coordinating its organization, training, and equipment with that of the Army—in addition, of course, to contributing heavily to its financial support In 1949, a committee appointed by Secretary of Defense Forrestal recommended that the National Guard (then numbering 343,266) be placed under exclusive federal jurisdiction State sentiment, however, was strongly opposed and the plan did not prevail[20]

**6 Man power for the armed services**

For more than 100 years, our people took pride in the fact that, in contrast with conscription systems prevailing in Continental Europe, our national as well as state armed services were manned by volunteers[21] Perhaps, even with numbers small, this would not always have been possible had standards been higher But in any case it was only when confronted with the huge demands associated with World War I that a different policy was instituted Even during that conflict, the Navy was able to secure all of the personnel it needed by voluntary enlistment The far larger forces required by the Army, however, could not be expected from this source, and, with war declared, Congress promptly enacted a measure setting up a nation wide scheme of compulsory service for the period of the emergency enabling a total of 3 7 million officers and men under arms eventually to be placed in the field Hope was strong that the procedure would not need to be repeated By 1940, however, Europe again was at war, with the United States gravely endangered, and under urging from President Roosevelt, Congress enacted our first peacetime conscription law, a Selective Service and Training Act requiring all males between the ages of 21 and 35 to register and making liable to active service all of the number selected by local draft boards, with consideration for physical condition, number of dependents, and importance in civilian employment to the war economy And from the arrangements thus introduced, as later expanded in various ways, arose the gigantic force of almost 12 million which the nation had under arms (in all services) when the Axis powers collapsed After hostilities ended, "selectees" were rapidly mustered out, the Selective Service Act was allowd to lapse, and in 1947 the armed services went on an all-volunteer basis for the first time since 1940

**Selective service revived**

Again, however, it was not for long Military commitments overseas (*e g*, for the occupation of conquered territories) proved heavy, "cold' war with

[19] Art I § 8 [illegible] 15 16

certain

ut even

the U S S R grew more menacing, enlistments nevertheless lagged Accordingly in 1948 Congress reluctantly enacted a new Selective Service Law patterned on the earlier one, and local draft boards again began picking men for training and service Through this means, together with calling up some reservists and National Guard units, the then authorized strength of the Army was reached, and once more selective service might have been dropped but for the complete change of situation produced by the Korean crisis of June, 1950, eventually leading to a new Universal Military Training and Service Act of June, 1951,[22] under which the plan has continued operating to the present day

Universal Military Training adopted in principle

With global war in progress or seriously threatened, there is, under modern conditions no possible alternative to a system providing flexible, but vast, numbers of fighting men Assuming that we will not always be in such a situation, yet at the same time always will require a state of preparedness far beyond anything known down to 35 or 40 years ago, there has been the question of what general scheme we might in future follow with greatest safety and economy and at the same time with least damage to the essential values in our national life Two obvious alternatives have been presented (1) to maintain a very large standing, and more or less professional, armed force (land, naval, and air), including a standing army not unlike those formerly found in countries like Germany, France and Japan, and (2) to keep fairly large naval and air forces, but for ground warfare to depend upon a relatively small, highly trained, ever ready, volunteer force, backed by a vast reserve of civilians at least partially prepared for quick service under some system of universal military training

To the first plan, there have been the manifest objections of heavy expense, weakening of the economy by cancelling out productive capacity, and violation of traditional attitudes and standards The second was advocated at the very beginning by President Washington, later by President Wilson, and in our own time has received warm support, not only from the Truman Administration and considerable elements in Congress, but from many thinking people in all fields and professions A highly favorable report in 1947 by a presidentially appointed Advisory Commission on Universal Training became the basis for one of many bills on the subject pressed upon Congress, and the critical circumstances of the past two years have given the subject fresh prominence, with definite decision presumably reached in a Universal Military Training and Service Act of June, 1951,[23] not only (1) prolonging Selective Service to July 1, 1955, lowering the age for induction from 19 to 18½ (with 25 remaining the upper limit) where local boards cannot find enough older men, and extending the period of service from 21 to 24 months, but also (2) deliberately laying the foundations for "U M T" by authorizing the President to appoint a five man National Security Training Commission to work out policies and standards for putting a scheme of universal military training

[22] Pub Law No 51—82nd Cong, 1st Sess
[23] Pub Law No 51—82nd Cong 1st Sess

into effect, with further regulatory legislation, however, required before a permanent system can become operative [24]

7 Law and justice in the armed forces

Within their respective spheres, Army, Navy, Air Force, and even Coast Guard have "governments" of their own, with the now consolidated "Military Laws of the United States" serving as a code of law, with gradations of military, naval, and other appropriate officers administering such law, with military police aiding in the enforcement of it, and with legal branches under judge advocates general, and likewise legal staffs attached to divisions and corps areas, supervising the exercise of functions of a judicial nature The regulations provided by Congress set forth the powers and duties of officers and men in various services, define offenses against discipline, specify procedures for trying persons accused of such offenses, fix penalties, and otherwise regulate military activities and conduct As would be surmised, great stress is placed on authority, discipline, and obedience, whether on the battlefield or in other situations, the word of the commanding officer is law, and the revisions of 1950 could not have been expected to relax this principle in any respect Those revisions did, however, somewhat soften the rigors of military justice, long a matter of just complaint not only within the armed services but among enlightened persons outside

The principal instrument of military justice is the court martial, composed (formerly altogether and still chiefly) in particular situations, of properly designated military officers, charged with hearing cases of infraction of the military laws, rendering decisions, and fixing penalties, which may extend to imprisonment or death The new "Uniform Code of Military Justice" accompanying the revised laws of 1950, however, for the first time gave enlisted men the privilege of trial by courts composed partly (up to one-third) of such enlisted men, enlarged the rights of accused persons by allowing qualified counsel and in other ways, and provided for boards of review or appeal in the several armed establishments, topped by a Court of Military Appeals in the Department of Defense consisting not of military men at all but of civilians Although subject principally to military law, soldiers, sailors, and airmen, are by no means exempt from the ordinary law applying to civilians Serious crimes, *e g* murder, constitute infractions of military as well as civil law, but cases involving them are likely to be tried in a civil court, and sometimes lesser offenses as well if committed outside of military posts or reservations

8 Atomic weapons

The weapons and techniques of modern war are shaped by science and technology, and a defense program of a country like the United States would fall fatally short without continuous research and invention During World War II, our government kept a force of some 30,000 scientists and engineers at work, spent half a billion dollars on their operations, and finally attained,

[24] The National Security Training Commission submitted its plan to the Congress on Oct 29 1951 as required by law and it must be reported out of the armed services committees of the two houses within 45 days after the opening of the 2nd session of the 82nd Congress This plan in accordance with the law contemplates a six month training period for boys of 18 followed by 7½ years of reserve status The Army is to train 50% of all inductees the Navy 28% and the Air Force 22% When fully developed the program is expected to provide training for 800 000 youths annually at a cost of $2 billion

as a crowning achievement, the "absolute weapon" in the form of the atomic bomb [25] Nor was effort relaxed after hostilities ceased, on the contrary, the Atomic Energy Act of 1945 and the National Security Act of 1947 provided for continuing it, the former by intrusting further atomic research to a permanent Atomic Energy Commission, the latter by setting up in the new Department of Defense a Research and Development Board under which supplementary and equally secret investigation and experimentation on weapons and related aspects of war are constantly in progress

Some questions

Harnessing of atomic energy, of course, not only hurled a general challenge at all means and methods of defense employed through the centuries on land and sea, but—with the world as it was—raised problems of almost unparalleled complexity and gravity The bombs that fell on Hiroshima and Nagasaki in 1945 resulted from scientific labors in which the United States, Great Britain and Canada had shared Should the well concealed processes of their manufacture be jealously guarded by the three governments or disclosed to an eager world? With so terrifying a force placed in human hands strong control over its use manifestly was essential Should such control be merely national, or should it be international, even universal, through the United Nations or some agency of its devising? First employed for military and destructive purposes, atomic energy also had vast industrial, medical and other civilian potentialities Should development of it in the United States be placed in military or in civilian hands?

To the first of these questions, President Truman, after consulting the British and Canadian governments, made reply that atomic secrets would be widely shared as soon as proper safeguards against their use for destructive purposes should have been provided, although to a degree the question has since been rendered academic by the known fact that the power whose access to the mystery would be of most concern to us, *i e* the U S S R , already has fathomed it and is in possession of the bomb With respect to control, it has seemed imperative, in the interest of all peoples, and of civilization itself, that every use of atomic weapons for hostile purposes be forbidden to individual nations under some scheme of international restriction, and to implement the principle, the United Nations has created an Atomic Energy Commission for installing full control on the international level Total deadlock between the U S S R and other powers, particularly the United States, has, however, paralyzed action, and of international control there is as yet not a trace So long as this situation exists, the United States will have no alternative to continuing manufacture and storage of bombs as a necessary element in its defense

The Atomic Energy Commission

Meanwhile, our Atomic Energy Act of 1945 vested in the United States full ownership of all domestic uranium and other materials essential for manufacture of the bomb and settled our own question of military or civilian control by assigning full responsibility for atomic development and utilization to a government corporation, the Atomic Energy Commission, headed by five civilians, although containing a Division of Military Application, and with the

[25] V Bush *Modern Arms and Free Men* (New York 1949), 6

Defense Department's Research and Development Board also maintaining a part military, part civilian, Atomic Research Committee Without losing sight of national security as a paramount concern, the Commission, in planning for atomic development and use, is required to aim also at "improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace", and a bipartisan joint congressional committee on atomic energy is required to be kept fully informed on Commission activities Operating almost entirely through contracts with industrial firms, colleges and universities, and government agencies, the Commission is assiduously advancing its objectives, including the production and improvement of atomic weapons, with present concentration on perfecting an H-bomb, or 'hydrogen bomb,' expected to be almost incalculably more powerful than any other bomb thus far detonated Oak Ridge, Tenn, Argonne, Ill, *and Hanford, Wash, are main production centers,* the Los Alamos Scientific Laboratory in New Mexico is a focal point for research, and Eniwetok Island in the Marshall archipelago, with population removed for the purpose, is the scene of most testing

## THE PEOPLE IN WARTIME

War in the modern manner is waged by civilians as well as by soldiers, sailors, and airmen, and for waging it they, too, must accept controls, sometimes amounting to regimentation Property, time, employment, convenience, freedom—all may be laid under contribution To start with, the principle is clear that the government may, in so far as it finds need, draft into its armed services able-bodied men of all ages and conditions, and women too for duties appropriate to them, conscription has become the rule, and no war of any magnitude will in future be waged without it When raising forces in this way, Congress fixes age limits specifies or authorizes classifications and priorities in terms of number of dependents and occupational usefulness for war purposes, and determines exemptions, and room is left for volunteering, especially by women But, within bounds of reason, expediency, and humanity, the government always can dig as deeply into the reservoir of potential combat and auxiliary personnel as circumstances require This it is doing in the defense mobilization of today

1 Service obligations

(a) Military liability

With the same purpose of all out effort, the government may take any needful measures for maximum utilization of the nation's civilian manpower and womanpower, even to the extent of registering all able bodied personnel of both sexes, imposing a 'work or fight" rule, and assigning people to jobs Although urged during World War II to follow the example of Great Britain in doing this, Congress did not go so far Almost immediately after Pearl Harbor, however, the draft as already operating was broadened to require all men up to the age of 64 to register for conscription either in the armed forces or for noncombatant duty, and throughout the conflict a War Manpower Commission, although without authority actually to compel men and women to work at particular jobs in particular places, promoted maximum use of personnel by mea-

(b) Productive employment

sures calculated to keep people employed in jobs and places where they were most needed and to discourage moving around in quest of more congenial and better paying positions In any future major war, we very well may see controls still more drastic

(c) Taxes

A form of service which virtually none can escape is support of the defense and war effort by paying taxes War costs never are currently met in full from taxation It would be better if a larger proportion of them were But with war, or even peacetime rearmament, in progress, the hand of the federal government unfailingly reaches more deeply into the pockets of taxpayers—and often into pockets previously immune

(d) Civilian defense

Still another obligation falling upon citizens of many communities is participation in civilian defense The United States has been fortunate enough to pass through two world wars without its cities being bombed or indeed foreign attack carried in any important way to its continental shores In any atomic war of the future, it cannot expect to be so fortunate Vast preparations for possible catastrophes must be made, for while local civilians cannot fight off bomb-carrying planes they can do much to alleviate the consequences of such visitations Even during the less menacing World War II, every state set up a defense council, several thousand cities and counties did likewise, and in all, millions of men and women rendered various sorts of voluntary service, if only (after danger from air raids had passed) in sustaining public morale and promoting food and other production Organization for civilian defense under a Civilian Defense Act of 1951, and supervised by a Federal Civil Defense Administration, is part also of the current rearmament effort

2 Restraints on civil liberties

Freedom always can be abused, and it is not difficult to see why, with the country at war (or even seriously threatened) and its life at stake, civil liberties—especially those relating to speech, press, and assembly—are likely to suffer curtailment Contrary to an impression sometimes encountered, such rights are not automatically suspended by the mere fact of war Rarely, indeed, are they formally and legally suspended at all But under the urgency of wartime situations they may become attenuated almost to the vanishing point Sometimes, indeed there is more repression than necessary, as, for example during World War I, when playing fast and loose with the terms of an Espionage Act of 1917 and a Sedition Act of 1918, the Department of Justice not only ferreted out and brought to punishment persons who by any reasonable standards were guilty of offenses against the national morale, but embarked upon, and for a time after the end of hostilities kept up, with even greater vigor, a "witch hunt" in the course of which gross wrongs were committed, especially as relating to aliens Happily, the record during World War II was much better The Espionage Act of 1917 was, it is true, called back into operation, a drastic code of regulations tantamount to a sedition law and embodied in the Alien Registration Act of 1940 was in full effect, and both nation and states enacted new protective regulations Properly enough, there was tightening up, especially against suspected "fifth columnists" On the other hand, both the President and the Department of Justice insisted that the excesses of World War I be not repeated, the Supreme Court, although often dividing,

commonly upheld challenged liberties unless palpable abuse could be shown, there were no "witch hunts", and on the whole the record was good Unquestionably, the fabric of rights was subjected to its severest strain, when, in 1942, all Japanese residents of designated areas adjacent to the Pacific coast—loyal as well as disloyal, citizen as well as alien—were uprooted from their homes and businesses and herded into remote relocation centers But even this action, although now generally regretted, was, when tested before the Supreme Court, held to be constitutional, given the circumstances existing

The special problem of censorship

War is waged not only with men, munitions, and materials, but also with ideas, and every wartime government—at any rate in a democratic country—must concern itself not only with getting to the people (and to friendly peoples abroad) the information it wants them to have and with cultivating a public opinion favorable to the war effort, but also with keeping from the enemy information useful to him and with preventing both the enemy and enemy sympathizers from damaging the national morale through open or secret propaganda Both tasks present difficulties, and the second, raising complicated questions of free speech, free press, and the like, is not only difficult, but also delicate The story of our government s efforts during World War I and II—in the first instance through a Committee on Public Information and in the second through an Office of War Information—to keep the people and their allies discreetly informed on war aims and developments would reveal a good deal of fumbling, yet reasonable attainment of the ends sought During World War II, responsibility for guarding against dissemination of information or opinion in ways injurious to our cause was intrusted to an Office of Censorship set up almost as soon as hostilities started, and here, too, the record of achievement was generally good On the one hand, there was literal and positive censorship, in the sense that all mail, cablegrams, long distance telephone calls, radio messages, and other communications going out of (or in the case of mail, coming into) the United States were minutely inspected, with objectionable passages deleted or even the entire message intercepted In the case, on the other hand, of domestic publications and radio-broadcasting, authorities employed the milder method of relying upon voluntary compliance of the press and the broadcasting companies with "*codes of wartime practices*" telling them what they must not print or put on the air—although, of course, with no lack of power to compel obedience where not otherwise forthcoming Closely related in wartime are, of course, laws and enforcing agencies designed to repress espionage, sabotage, and sedition, and especially to protect the armed forces against subversive influences Under Supreme Court rulings, criticism of the government or of its conduct of war constitutes sedition only when creating a "clear and present danger" of injury to some vital interest of the United States

Martial law and its significance

*Martial* law should not be confused with *military* law The latter emanates from Congress and applies only to persons in (or at all events closely associated with) the armed services, the former emanates from military commanders and normally applies only to the civilian population of specified areas within an actual or potential zone of military operations, although members

of the military within such areas may to some degree be affected also Furthermore, whereas military law takes the form of definite codes which can be read and studied, martial law constitutes no fixed system, but on the contrary consists simply, in any particular situation, of whatever rules and regulations the competent military authority may from day to day impose—the essence of martial law being the supplanting for the time being of the ordinary law, and of the courts and other authorities operating under it, by a special regime in which the commander s word becomes the law and special tribunals set up by him (to be distinguished, of course, from courts martial) handle cases arising under it There are mixed situations in which civilian authorities may enlist the assistance of the military in executing the regular law, without martial law in the full sense being introduced And even where full martial law prevails, it is not outside of the constitution and does not automatically abrogate the citizen s constitutional rights, for example, while the privilege of the writ of *habeas corpus* usually is suspended when martial law is in operation, mere proclamation of such law does not of itself suspend the writ In the great majority of cases, martial law operates under state rather than federal authority, being proclaimed by the governor when he has reason to believe that a disaster like a great fire or an earthquake, or disorder growing out of labor troubles, or peril in wartime, has created need in a given area (city, county, or section) for something more than the normal functioning of the regular authorities In one critical period of our history (the Civil War), however, martial law was proclaimed for specified areas also by the president; and when Lincoln's acts were judicially challenged, the Supreme Court sustained them, although in one case holding it unconstitutional for federal authorities to suspend the privilege of the writ of *habeas corpus* in an area not actually a scene of military operations [26]

3 Economic controls (a) Production

Half a dozen clauses of the federal constitution suggest that for carrying on a war Congress may tax, borrow, spend, raise troops, build ships and buy airplanes practically without restraint, with the president exercising not only powers given him by the two branches but the broad and undefined functions accruing to him as chief executive and commander-in chief But such clauses convey little idea of what this may mean for the national economy —for industrial production, transportation, communications, wages, prices and daily civilian life Aside from a steady stream of trained men, the prime necessity in present day war, or even in stepped up preparation for war, is almost incredible quantities of munitions and supplies—ships, tanks, trucks, guns, ammunition, and materials like steel, copper, aluminum, rubber, and chemicals necessary to their manufacture So essential is vast and speedy production of these that in 1941 some people would have had the government take over substantially all industry producing articles likely to be needed As during World War I, however, so drastic a policy was not found necessary Throughout the conflict s earlier stages, the government did indeed build plants (operating them directly or more often through private corporations under contract) and take over and operate establishments crippled or threatened

[26] Cf p 110 above

by work stoppages In the main, nevertheless, it relied upon industry publicly stimulated and controlled but privately owned and managed It financed the establishment and expansion of plants, required plants to be turned from civilian to military production, built stockpiles of strategic materials, estab lished priorities for funneling materials to war industries in need of them, and in the case of synthetic rubber virtually created a new industry Even more fully than the War Industries Board of World War I, the War Production Board of World War II acquired mastery of the nation wide war production process, and undoubtedly more industrial potential would have been taken over publicly if that hard working civilian agency had proved less capable of getting results To the general population, the program brought increased opportunities for profitable employment but also scarcities resulting from cut-backs of production of consumer goods and in some instances, *e g*, refrigerators, washing machines and radios, from suspension of such production altogether

(b) Wages prices and dis tribution of goods

War, or intensive preparation for it invariably starts still another chain of dislocations in the economy An upsurge of government expenditures, reenforced by augmented employment produces a rise of prices, higher prices push up wages, higher wages, more spending power, and increasing scarcity of consumer goods stimulate further price rises and unless brakes are applied, the spiral ends in heavy inflation particularly devastating for people of fixed incomes but eventually disastrous for almost the entire community Speaking broadly, whatever checks are imposed must come from government, and, with various federal wage and price controls during World War I as precedents, an Office of Economic Stabilization early in World War II fixed wage ceilings for different industries while an Office of Price Administration placed and kept under reasonable restraint prices of commodities (rents also) likely to be most affected by prevailing scarcities In connection with price controls, the O P A also, with a view to fair distribution, rationed among consumers the country over, long lists of commodities (automobiles, tires, gasoline, fuel oil, farm machinery, shoes, coffee, sugar meats, and many other things), demand for which was out of proportion to supply

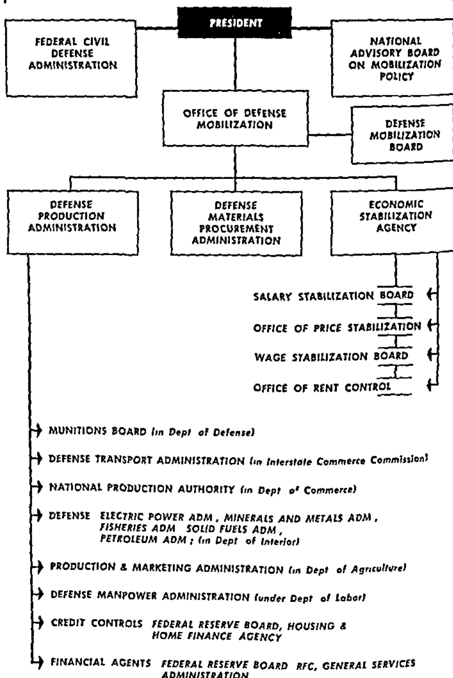
(c) Trans portation

Almost as vital as the production of war materials is the transportation of them (and of troops) to places where they are needed, and here the federal government, with full power over interstate and foreign commerce, has especially free scope During World War I, the railroads were taken over and federally operated During World War II, no need for such a course arose But, within the framework of preexisting transportation controls exercised by the Interstate Commerce Commission and allied agencies, an Office of

A new round of mobiliza tion con trols 1950 51

Although expanded after war came, the extraordinary controls outlined were instituted in 1940-41, when—though with war manifestly drawing nearer—the country still was at peace The almost equally stupendous mobilization effort engaging the country's energies today similarly started,

# DEFENSE MOBILIZATION ORGANIZATION, 1951



in 1950, under conditions of nominal peace—except only that in this instance American forces already were carrying the banner of the United Nations in an action in Korea precipitated by Communist aggression and certainly tantamount to war even though not officially so termed Whether a global war will follow—in one year, two years, or ten—and carry the parallel farther, remains to be seen But in any case, the country is preparing, by methods and with objectives reminiscent of those of a decade ago So largely, indeed, does the evolving organizational and functional pattern follow that recently dismantled that description hardly could fail to result in unprofitable repetition; and accordingly without disparagement of its importance, the matter will be passed over with merely a diagram listing principal agencies and functions as of mid-1951

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CHAPTER 34

# Territories, Dependencies, and Special Jurisdictions

**The territorial growth of the United States**

During the American Revolution, 13 English colonies along the Atlantic seaboard set themselves up as self-governing states, and from these states the original United States was created People of that day considered the country large, and since, as defined in the peace treaty of 1783, it included not only the 13 organized states, but all territory between the Great Lakes and Florida and westward to the Mississippi, it really was so, under conditions of communications and transportation then existing Every student of our history knows, however, that this was only a beginning The Louisiana Purchase of 1803, the annexation of Florida in 1819 and of Texas in 1845, the Oregon Treaty of 1846, and acquisitions from Mexico after the war of 1846-48 rounded out our dominion to the Pacific, Alaska was bought from Russia in 1867, breaking into the great oceans to east and west, as the nineteenth century closed, we acquired Puerto Rico, Hawaii, Guam, and the Philippines, in 1904, the Panama Canal Zone was added and in 1917 the Virgin Islands—all with the result that by World War II the American flag was flying over considerably more than three million square miles of continental, and more than 700,000 square miles of insular, territory In the history of territorial expansion in modern times, only that of Great Britain, Russia, and perhaps France, is comparable

**Beginnings of territorial government**

When our present constitution went into operation in 1789, the United States already was the possessor of a vast stretch of dependent territory With a view of terminating disputes and promoting national unity, four states—Massachusetts, Connecticut, New York, and Virginia—had, between 1782 and 1786, ceded to the new nation extensive areas west of the Alleghanies and north of the Ohio River, and undoubtedly it was with this great expanse chiefly in mind that the constitution's framers wrote into the document as one of its most cogent clauses a grant of power to Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States "[1] Already, too, the first chapter in the long story of American territorial government had been written, for in 1787 (shortly before the constitution was framed), the Congress of the Confederation had enacted the most significant measure ever coming from its

[1] Art IV § 3 cl 2

hands, in the form of a Northwest Ordinance for the government of the region north of the Ohio and westward to the Mississippi—a fundamental law which the new Congress under the constitution promptly reenacted substantially without change

Significance of the Northwest Ordinance

The Northwest Ordinance was significant in its time because of its liberal provisions for local self-government, for representation in Congress, and for fundamental civil and political rights, and also because of assurance given that after suitable growth of population the Territory would be admitted to the Union as a state, or group of states, on a footing of equality with the older states Moreover, the pattern thus fixed was adhered to in practically all subsequent congressional legislation for the government of our contiguous continental possessions [2] Many clauses of later organic acts for individual territories were copied almost verbatim from the Ordinance, while the principle of territorial status as merely preparatory for statehood was steadfastly adhered to in the case of all contiguous territories, and set up a certain presumption even in the case of possessions like Alaska, Hawaii, and Puerto Rico From the Northwest Territory, five states eventually were created, *i e*, Ohio Indiana, Illinois, Michigan, and Wisconsin In similar manner, from the Southwest Territory came the states of Kentucky, Tennessee, Alabama, and Mississippi

## POWER TO ACQUIRE AND GOVERN TERRITORY

Power to acquire

The territorial governments mentioned—both Northwest and Southwest—were set up in areas comprehended within the United States and simply taken over from the Confederation Whether, in the constitutional clause cited above, there was any intention to authorize the new national government to acquire other regions, even though contiguous, is not clear On its face, the grant related only to 'disposing of' territory and making "needful rules and regulations" concerning it, not to acquiring it, and when Louisiana was annexed, Jefferson would have been more comfortable if the step could have been authorized by a constitutional amendment But in any event repeated decisions of the Supreme Court have settled beyond question that the United States has full right to acquire territory, not only by virtue of the clause quoted, but by necessary inference from the power to admit new states, the power to make treaties, the power to carry on war and make peace, and the power to tax and spend, and it is by virtue of authority implied in one or more of these express grants that every significant annexation from Louisiana to the Virgin Islands has been consummated If these sources of power were insufficient, there still would be the right possessed by every sovereign state, under international law, to acquire territory by discovery and occupation, or indeed by any method compatible with recognized international usage, and it was by discovery and occupation that we possessed ourselves of some of the Guano Islands in the mid Pacific in 1856 and more recently of certain lands

[2] Starting in 1790 with arrangements for the region south of the Ohio known as the Southwest Territory

in Antarctica But the authority implicit in the constitution really needs no reenforcement

Power t govern

In the case of territory acquired by peaceful means, congressional authority to legislate for its government begins the moment the title of the United States is established For the time being, territory occupied during war is governed by the president, as commander in chief, and through the Army or Navy or both With peace restored, the president may go on governing only by express or tacit authorization of Congress, and in the case of any territory of considerable extent or importance, Congress itself sooner or later will take over

The full scope of congressional power over dependent territory rarely is *understood by the layman First of all, one notes the basic authority to* ' incorporate ' a territory into the United States, giving it as we shall see, a higher constitutional status than if it were left ' unincorporated " In the second place, it is for Congress to fix the form of government that a territory shall have If the area later becomes a state its people may change the form in various ways but as mere territorial inhabitants they do not determine it Equally important, Congress may itself literally and directly govern a territory in so far as it chooses Ordinarily, of course, the work of government will be left mainly to duly constituted territorial legislatures courts, and other organs But Congress may review and disallow territorial legislation, the president may be authorized to veto it, *the courts may invalidate it*, and Congress itself may directly legislate for a given territory on education, police public utilities, and other matters with no distinction between delegated and reserved powers such as restrains in legislating for the nation at large In other words, superior to any local legislature (or other authority) with which a territory may have been endowed is Congress with full power as such and in addition all the latitude (and more) enjoyed by the legislature of a state Legally, territories are not parts, but only appendages, of the federal system

## TYPES OF TERRITORIES

New situation after the *Spanish* American War

With the exception of Alaska, all territories acquired by the United States before the Spanish-American War were contiguous, and had been settled and *developed by natives of this country and* by European immigrants whose civilization and traditions were not fundamentally different from our own Consequently, Congress had little or no hesitation about extending to them a large measure of self government and all of the civil rights guaranteed by the national constitution The annexation of Hawaii in 1898, however, and in particular the Spanish American War, brought under control of the United States non contiguous territories lying in the tropics and inhabited by relatively backward peoples of different race and language, almost totally inexperienced in self government, and enjoying few if any of the civil and political rights which long have been the cherished heritage of our own citizens *Admittedly, the power to govern* these new possessions resided in Congress, and at first glance it seemed necessary, in view of earlier Supreme Court

decisions, to extend to their inhabitants all of the rights and privileges enumerated in the constitution, including freedom of speech and press, the right to bear arms, and trial by jury Embarrassing results, however, that might flow from such a course made it desirable to draw some distinction between the legal status of these new accessions and that of the older territories on the continent, and in a series of "Insular Cases" decided in 1901,[3] the Supreme Court, after some wavering, finally developed such a distinction, thereby releasing Congress from indirect judicially imposed restrictions under which it otherwise would have been compelled to labor

**"Incorporated" and unincorporated territories**

The distinction evolved (entirely new to our jurisprudence) was one as between territory "incorporated" into the United States and territory "not incorporated" In the former category were included Alaska, Oklahoma, New Mexico, and Arizona, none of which, at the time, had yet been admitted to statehood In legislating for such incorporated territories, said the Court, Congress was bound by all constitutional limitations, *e g*, as to civil rights, not plainly inapplicable Hawaii, Guam, Puerto Rico, and the Philippines, on the other hand, were "unincorporated" territories They belonged, it is true to the United States rather than to any foreign power, they were appurtenant to, and dependencies of, the United States But the mere fact of annexation did not make them *parts* of the United States in the sense that all provisions of the constitution necessarily became applicable to them Only if and when expressly "incorporated" into the country by congressional act would they achieve such a status, and meanwhile, in legislating for them, Congress was bound, not by all of the constitutional restrictions applicable to incorporated territories, but only by those contained in parts of the instrument to be regarded as "fundamental" rather than merely "formal" or "procedural"

**Some practical distinctions**

Announcement of this interesting doctrine was accompanied, however, by no listing of the constitution's "fundamental" and "formal" parts, and none ever has been attempted, either by the Court or by Congress Rather, the policy has been to draw the distinction piecemeal as laws are enacted and cases decided under them Three significant conclusions arrived at may be mentioned (1) in the Insular decisions themselves, the constitution's requirement that "all duties, imports, and excises shall be uniform throughout the United States" was construed to mean that rates in incorporated territories must be the same as in the states, but in unincorporated ones may differ; (2) persons born in incorporated territories automatically become citizens of the United States while those born in unincorporated ones normally do not, and (3) the constitution carries its full panoply of civil rights into incorporated territories but in the case of unincorporated ones, only such broad and general guarantees as life and liberty, and not "formal" procedural rights like indictment by grand jury, trial by petit jury, and assistance of counsel By special act, Congress may give an unincorporated territory constitutional rights not ordinarily associated with its status, as has been done in the case

[3] Chiefly DeLima v Bidwell (182 U S 1) Dooley v United States (182 U S 222) and Downes v Bidwell (182 U S 244) all turning upon the question of whether the tariff laws of the United States were fully applicable to Puerto Rico

of Puerto Rico, and of course such a *territory may become entitled to the* constitution's full benefits by being incorporated, as was Hawaii by act of 1900 and Alaska by the cumulative effect of various statutes after its annexation. But meanwhile the flexibility obligingly found by the Supreme Court has given Congress and the president some discretion, useful especially during the first quarter of the present century, in dealing with problems arising out of our possession of tropical dependencies inhabited by politically inexperienced peoples.

Territories classified

No very exact classification of our existing territories and dependencies is possible, but in general they fall into three categories: (1) incorporated and fully organized territories,[4] of which there now are two, *i.e.* Alaska and Hawaii, (2) territories legally unincorporated but organized and with some aspects of incorporated status, *i.e.*, Puerto Rico, the Virgin Islands, and Guam, and (3) dependencies wholly unincorporated and unorganized, *e.g.*, the Canal Zone, American Samoa, Wake, and a number of other mid Pacific islands. Outside of this classification fall as special territorial *interests*: (1) certain air and navy bases in the Atlantic and Pacific gained in connection with World War II by international agreement or conquest, (2) a "trusteeship" under the United Nations for the Trust Territory of the Pacific Islands, and (3) certain areas in the Caribbean—chiefly Haiti and Santo Domingo—in which the United States has assumed limited protective responsibilities.

Arrangements for central supervision

Most European nations having overseas possessions concentrate supervision of them in a colonial ministry or other single executive department.[5] Traditionally, the United States has instead parcelled out the responsibility among various departments, all concerned primarily with other matters. Thus until of late the Interior Department's Division of Territories and Island Possessions had oversight of the incorporated and partly incorporated areas, the Navy Department looked after Guam, Samoa, Wake, Midway, and several other possessions of strategic or defensive interest, together with the *Trust Territory of the Pacific Islands, and the Department of the Army supervised* the Canal Zone. The Hoover Commission found the situation chaotic and thought the best solution a concentration of all such responsibilities, along with still others, in an independent Administration of Overseas Affairs *reporting directly to the president*. Eventually, such an arrangement may be introduced. In the meantime, however, the trend is toward concentration not in an independent establishment, but in the Department of the Interior, where the former Division of Territories and Island Possessions has been replaced by an Office of Territories with broadened functions and jurisdiction. Supervision of incorporated and partly incorporated possessions remains there, in 1950, Guam was added, on July 1, 1951, American Samoa, the Trust Territory, Howland, Baker, and Jarvis were similarly transferred, and today the Navy retains only Wake, Midway, and Johnston Islands, together with two Hawaiian islets employed for strictly naval purposes and Kingman

[4] "Organized" in the sense of having a legislature and a good deal of local self government.
[5] Great Britain, however, has both a Colonial Office and a Commonwealth Relations Office and formerly had an India Office in addition.

Reef and Sand Island, both uninhabited With these minor exceptions, the Canal Zone remains our only dependency not under full civilian control

## ALASKA AND HAWAII—THE QUESTION OF STATEHOOD

Executive and legislative machinery

In most essential respects, the status of these two top level territories (defined in organic acts which only Congress can amend) is identical with that enjoyed by our newer states when they were passing through the territorial stage The inhabitants are citizens of the United States, and the constitution and all laws of the United States not locally inapplicable are expressly declared to be in effect In each territory, the present government consists of separate executive legislative, and judicial branches There is a governor, appointed by the president and Senate at Washington for a four year term and paid out of the national treasury, and a legislature consisting of a senate and a house of representatives, and legislative sessions are held biennially The election of senators and representatives (also of the "voteless" delegate which the territory sends to Congress) may be participated in by bona fide residents for a year, 21 years of age, of citizen status, and able to read and write English (or in Hawaii, Hawaiian) Legislative measures, or items therein, may be vetoed by the governor, and also can be (though rarely are) disallowed by Congress A governor's veto may, however, be overcome by a two thirds vote in both houses

Judicial organization

Judicial power in Alaska is exercised entirely by a single federal district court organized in four divisions In Hawaii, there are two sets of courts territorial and federal The territorial courts correspond rather closely to our state courts, and include a supreme court, circuit courts, and such inferior courts as the legislature may from time to time create The supreme court consists of a chief justice and two associate justices, all of whom must be citizens of Hawaii and both they and the judges of the circuit courts are appointed by the president and Senate for four year terms, unless sooner removed by the president Besides these territorial courts, there is a federal district court, also, a district attorney and a marshal—all appointed by the president and Senate for six year terms and subject to presidential removal[6]

The question of statehood

Both Alaska and Hawaii are active candidates for statehood, and undoubtedly one or the other will become the first outlying member of the Union The case for Alaska is less convincing than that for Hawaii Larger than Texas, California, and Montana combined, and endowed with extensive mineral, timber, water power, and fishery resources, the northern territory has as yet a population, partly settled, partly transient, of only 128,643 (including numerous native Indians, Aleuts, and Eskimos), and has not a highly developed economy, nearly all of the land, indeed, is owned by the federal government On the other hand, the present rate of growth soon will bring the territory abreast of our least populous state (Nevada, with 160,000), and like the present white inhabitants, most of the newcomers will be former

[6] United States courts in the territories are of course leg slative courts (see pp 348 349 above)

residents of other parts of the United States. Hawaii's situation is different in that the territorial population (499,794) exceeds that of four existing states, and also in that politically and economically the territory has attained considerably greater maturity and stability than has Alaska. Before World War II, an objection always raised when statehood was proposed was that while the Islands constituted our primary fortress in the Pacific, more than half of their inhabitants were Japanese immigrants (*Issei*) or native born persons of Japanese ancestry (*Nisei*). The demonstrated loyalty of practically all of these people has, however, removed substantially all concern on that score.

*Progress of proposals*

*The two situations are unlike, yet politically tied together by an informal* understanding between Democrats and Republicans in Congress that if and when Alaska, which normally is Democratic, is admitted, Hawaii, which is Republican, will be admitted also, and accordingly one problem is rarely discussed without the other also in mind. As far back as 1940, an advisory referendum in Hawaii brought out a territorial vote favorable to statehood by more than two to one, and while sentiment in Alaska crystallized more slowly, a like test in 1946 showed 60 per cent of the electorate also desirous of such "promotion." Meanwhile, both of our major political parties went on record in 1940 and 1944 with platform declarations favoring "eventual" statehood for not only Alaska and Hawaii but also Puerto Rico, and four years later both reiterated their stand on Alaska and Hawaii, the Democrats substituting for 'eventual' the term "immediate." Through the years, congressional delegations were dispatched to both territories to look into their readiness for statehood, and while caution sometimes was urged (especially as to Alaska), sentiment in the two houses and in administrative circles gradually grew more favorable, with President Truman repeatedly advocating admission of both territories. "Enabling" bills authorizing one or the other to elect a convention, frame a constitution, and formally apply for admission multiplied; as long ago as 1947, such a bill for Hawaii passed the House of Representatives, although not the Senate, and early in 1950 the Islands, tired of waiting, proceeded of their own accord to set up a non partisan convention of 63 members which in a four month session drafted a comprehensive and forward looking constitution for submission first to the Islands' voters (who later overwhelmingly ratified it) and afterwards to Congress.

Meanwhile, so far as the House of Representatives was concerned, the end of the road was brought within sight. On March 3, 1950, that body passed an enabling act for Alaska, and five days later (with the Islands' constitution-makers about to convene at Honolulu) a similar one for Hawaii. Again the hurdle remaining was the Senate. In that branch, the House Hawaiian enabling bill of 1947 never had been brought to a vote, and notwithstanding appeals by President Truman, backed by the Departments of State and Defense and by the territorial governments, both 1950 measures suffered a similar fate. Opposition was especially strong to giving Alaska's tiny population Senate votes that might cancel out votes from states containing many millions.

## PUERTO RICO, VIRGIN ISLANDS, AND GUAM

Puerto Rico (a) Movement for a constitution

Most important among our unincorporated territories today is Puerto Rico, governed under organic acts passed by Congress in 1900 and 1917—the later one conferring United States citizenship upon the inhabitants, and also giving them a bill of rights covering almost everything in the first eight amendments to the federal constitution except trial by jury and indictment by grand jury Most statutory laws of the United States not locally unsuitable apply in the island, and all in all, the situation is not very different from that found in an incorporated territory like Hawaii A new chapter in the island's constitutional experience under American control is, however, unfolding, and significant changes may result In 1950, Congress authorized the insular electorate to vote on the question of a convention to frame a constitution, a few months later, 777,400 voters registered for the purpose, the referendum taken on June 4, 1951, yielded a vote of 386 812 to 118,941 for the proposal, and the convention was duly chosen on August 27, with the resulting instrument due to be submitted to the insular electorate on January 21, 1952, and (if ratified) to be laid before Congress by the president provided found by him consistent with the enabling legislation of 1950 and with the federal constitution Under these circumstances, any comment on the island's present government, however brief, must be accompanied by warning that at various points—although hardly in fundamentals—there presently may be alterations

(b) Government

So similar, moreover, to that of Hawaii has Puerto Rico's government been that only three or four differing features need be mentioned here (1) since 1948 the governor has been a native elected by the voters of the island instead of a presidential appointee from the United States—the only case of the kind in our territorial experience, (2) legislative sessions are annual rather than biennial, (3) legislative organization and procedure are regulated in greater detail in organic acts, and (4) whereas in Hawaii and Alaska a measure vetoed by the governor automatically becomes law upon being repassed by a two thirds vote in both houses (and if not disallowed by Congress), in Puerto Rico a vetoed measure so repassed may be referred by the governor to the president at Washington, finally becoming law only if that official approves it or fails to act

(c) Insular dissatisfaction

For a good while, Puerto Ricans have been dissatisfied with their lot, but far from agreed upon how it can be improved The basic difficulty is economic, an island only 100 miles long and 35 miles wide, with few resources or potentialities except of an agricultural nature, and with present day agricultural economy based heavily on only a single crop (sugar), is burdened with a swiftly increasing population (now 2,210,703) far too large to be supported comfortably, with the result of little prospect for its people except the poverty and squalor in which the masses always have lived The connection with the United States has proved of some benefit yet has been by no means an unmixed blessing for either the island or the controlling country, and assimilation is seriously impeded by the predominant insular language being Spanish and the cultural background Latin

Politically, the situation is complicated by the existence of a number of parties agreeing only on the desirability of some change in the island s legal status and on the moral right of the inhabitants to determine their political future for themselves Some elements favor complete independence, perhaps after a preparatory period such as the Philippines experienced before winning final separation in 1946 Other groups look toward something approaching the autonomous status of a British dominion Still others look toward statehood, and several times the insular legislature has petitioned Congress on the subject, contending that morally if not legally half a century of control over the island s affairs commits the United States to such a grant On the part of this country, however, there well may be hesitation not only because of the island s backwardness, but because of cultural differences tending to preclude it from ever becoming an integral part of the American scene Both in 1940 and 1944, the platforms of the Republican and Democratic parties declared for Puerto Rican statehood eventually Such gestures, however, are not to be taken very seriously, and in any case 'eventually is an evasive word Visiting the island in 1948, President Truman reiterated earlier assurances that the people will be permitted to determine their ultimate political status for themselves, although from considerations of national security there certainly would in the pinch be hesitation in Congress over independence, and, for linguistic, cultural and economic reasons, no less reluctance to concede statehood As a matter of fact, a good many present insular officials recognizing that statehood would subject Puerto Ricans to federal income taxes and undoubtedly curtail the flow of American business into the island to escape such taxes, are lukewarm on the subject A Statehood party nevertheless warmly supports the present effort for a constitution in the belief that such an instrument would mark an important step toward admission to the Union

**2 The Virgin Islands**

Acquired from Denmark by purchase in 1917 as a move to forestall possible annexation by Germany the Virgin Islands (in the Lesser Antilles and with an area of only 140 square miles) remained under direct control of the president until 1936 when an organic act passed by Congress extended to their 22,000 inhabitants (made United States citizens in 1927, and now numbering 26 665) a liberal measure of home rule The insular legislature consists of the popularly elected municipal councils of (a) St Croix and (b) St Thomas and St John, sitting as a single house, executive power is vested in a governor appointed by the president and Senate for an indefinite term, and the judiciary consists of a district court, together with such inferior courts as may be established by law

**3 Guam**

Largest of the Marianas and endowed with an excellent harbor, Guam was acquired from Spain in 1898, and long has served usefully as an American naval station and potential naval base Prior to its conquest by Japan in 1942, the island was governed simply by the president through the commandant of the local naval station, who commonly had little taste or talent for civil administration There was, it is true, a locally elected "congress," but with only extremely limited legislative powers, and with Japanese control ended in 1944, the previous arrangements were restored Already, however,

the people of the island (today numbering 59,498) were conceded to deserve something better, and after long and desultory discussion, Congress, in 1950, passed an organic act meeting repeated requests of President Truman and giving the island (now transferred from Navy to Interior supervision) a system of civil government, with United States citizenship also conferred upon the inhabitants A full bill of rights was granted and a scheme of government authorized embracing a governor appointed by the president and Senate for four years, a one house, 21-member legislature chosen at large for two years, and a judiciary headed by a "district court of Guam" In this legislation, a long standing desire of a loyal people was met and a simple act of justice done

## MISCELLANEOUS UNORGANIZED DEPENDENCIES

1 The Canal Zone

The Canal Zone comprises a strip of territory five miles wide on each side of the Panama Canal, leased in perpetuity from the republic of Panama in 1903, and with a population in 1950 of 52,300, nearly all occupied with operating or defending the Canal During construction of the waterway, the Zone was governed by the president through a commission When, however, the work neared completion, Congress, in 1913, authorized the president to discontinue the commission and thenceforth to govern the Canal and Zone through a governor and such other officials as he might find necessary In consequence, a "governor of the Canal Zone", appointed by the president and Senate for four years, and always an Army engineer, although operating with a civilian staff, now administers the affairs of the Canal and the Zone, under supervision of the secretary of the army In the absence of a local legislature, such laws as operate within the area either are enacted by Congress or take the form of presidential orders Provision has been made for organized towns, and for a system of courts including a district court and beneath it magistrates' courts corresponding to justices of the peace elsewhere But there is not an elective official in the Zone, and government is hardly more than a phase of operating and defending the Canal itself Indeed, the area—merely a lease hold—is not officially reckoned as a 'territorial possession of the United States"

2 Mid Pacific islands

Until brought into the limelight by World War II most of our minor island possessions—American Samoa, Wake, Midway, Jarvis, Johnston, Baker, Howland (all in the mid Pacific)—were for the average person hardly more than names on the map, if even that In the absence of any arrangements by Congress fixing a definite constitutional status, all (including Guam) long were looked after by the Navy Department, although, as indicated above, Samoa and several others were taken over in 1951 by the Department of the Interior, and while preparations have been in progress for giving Samoa (population 18,602) a new and more democratic regime similar to that of Guam, none of the islands is as yet in any sense self governing Several of the number (collectively known as the Guano Islands) are of importance chiefly as way stations on trans-Pacific air-routes

## TRUSTEESHIP IN THE SOUTH PACIFIC

"The Trust Territory of the Pacific Islands"

Promptly after the United States was drawn into World War II, everything west of Midway was lost to Japan Except at remote points in the Aleutian archipelago, Alaska, however, never was invaded, and despite much damage at Pearl Harbor in the initial attack, Hawaii remained secure, serving throughout the war as a major base for our operations in the central Pacific The Philippines, of course were lost, but regained in 1944-45, Guam and Baker Island were recovered in 1944 and in the end not a square foot of the American empire in the Pacific was sacrificed—save, of course, for the independence voluntarily given the Philippines in 1946 Not only so, but the question thrust itself forward of whether, as a feature of the peace settlement, our dominion should not be extended to include part or all of the sprays of islets in Micronesia (the Marianas Marshalls and Carolines, with a total area of less than 700 square miles but scattered over an expanse of three million square miles north of the equator), formerly held by Japan under mandate from the League of Nations but later taken by American arms—as well as possibly certain other strategically situated South Pacific islands, *e g*, Okinawa and the Bonins, in addition In official circles at Washington it was virtually taken for granted that, in the case of the former mandated islands at least, American control in some form would be retained, and when President Truman transmitted to the Security Council of the United Nations a plan under which the United States should be designated as custodian of the islands under the new United Nations trusteeship system (as an alternative to the outright annexation for which there was a good deal of demand), the proposal was, in April, 1947, unanimously accepted

From the later stages of the war, the islands had been in American hands, under military government After Congress ratified the trusteeship, however, some arrangement for at least quasi civil administration became desirable, and under the plan adopted the Navy assumed responsibility, with the commander of the Pacific fleet in charge—pending transfer to some civilian agency, which, as noted above took place in 1951, when administration passed to the Department of the Interior Full power to make any laws needed by the Islands rests, of course, with Congress

American rights and responsibilities

With the "Territory of the Pacific Islands' trusteeship established, the United States embarked upon a form of territorial management entirely new to its experience, and the results will be watched with interest The archipelagoes affected, with their thousands of volcanic or coral islands and reefs (only 96 inhabited) and their 54 000 people, are not American "possessions",[7] title to them vests rather in the United Nations as successor to the old League, and the United States merely administers their affairs, through a high commissioner (now former Senator Elbert D Thomas) and under responsibility to a U N Trusteeship Council for promoting the 'political, eco-

[7] Except of course Guam geographically within the trusteeship area but not a part of it administratively

nomic, social, and educational advancement of the natives "[8] In contrast with mandated areas under the former League, however, they, as trust territories of a specially defined 'strategic area" class—the only one of the kind thus far approved by the U N Security Council—may be closed to observers (specified locations at all events) and converted into fortresses of defense, and such possible use, for our own security and for safeguarding international peace, is, of course, a main reason, notwithstanding the prospect of heavy economic liability, for desiring to have them in our hands[9] It is a curious coincidence that just at the time when the United States was voluntarily surrendering control over the Philippine Islands, the nation should have been gathering to itself the elements of a new empire in the Pacific[10]

## THE PHILIPPINE ISLANDS—AN "INDEPENDENT DEPENDENCY"

On world maps, the Philippine Islands no longer appear in the American color, for on July 4, 1946 they achieved their long-coveted independence and entered the family of sovereign nations as the Philippine Republic For almost half a century, however, their development and future transcended all other American questions of territorial policy, and not even legal separation has left us without a Philippine problem "

Earlier American policies

From the time when the Islands were unexpectedly acquired in 1898 as a result of the war with Spain, two lines of policy sharply distinguished our handling of them from British, French, Dutch, and other colonial operations in that part of the world One was systematic preparation of the inhabitants for self government, and this objective was so far attained that within a generation all but about three per cent of the public officials were natives Closely related was the policy of keeping open the question of eventual independence and after it became clear that the majority of Filipinos would be satisfied with nothing less, a Jones Act of 1916 promised liberation as soon as "a stable government should have been achieved A Philippine Independence Act of 1934 instituted a "Philippine Commonwealth' for a final ten year period of tutelage, and not even insular conquest, reconquest, and devastation in World War II was allowed to interfere with consummation of the independence program according to schedule in 1946 Our relinquishment of the Islands by purely voluntary act has no parallel in our own territorial experience or (except for Great Britain's later yielding of political control in Burma and India) in that of other colonial powers

Even under normal conditions, the United States could not simply have given the Islands their independence and then walked out Four decades of

[8] Periodic reports are made to the Trusteeship Council and inspections carried out by its agents Indeed our government reports to the Council on all of our dependent territories

[9] One of the islets Eniwetok has been cleared of its inhabitants and turned into a testing ground for atomic explosives

[10] In a long delayed [illegible] 8, 1951 [illegible]

*Continuing connections and responsibilities*

preferential treatment for Philippine products in American markets had so shaped the insular economy that the advantage could not suddenly be cut off without precipitating chaos, Americans had large business interests in the Islands to be protected, and both insular security and American defenses in the Pacific required some continued use of the Islands by our military and naval establishments With the Islands shattered, however, by three years of Japanese domination, and with the menace of Communist conquest overhanging the Far East, American interest and responsibility were proportionally magnified, and out of the situation have come continued relations impossible to review here but summarizing in part as follows (1) liberal American financial assistance (appropriations and loans) and technical aid for rehabilitation of the Islands' industries utilities, and social services, (2) cushioning of the economic effects of independence by arrangements under which principal Philippine commodities (within flexible quotas) enter our ports duty free until 1954, and thereafter under tariff rates rising but not reaching the levels on goods from other countries until 1974, (3) guarantee of continued parity of opportunity in the Islands for American capital and enterprise, (4) agreements under which the United States keeps a number of military sites and naval bases or stations in the Islands, and continues to assist in training and equipping insular armed forces, and (5) a mutual defense pact of August 30, 1951, amounting to a military alliance

*Our unfinished task*

To both the parity rights guaranteed American business and the military and naval privileges confirmed to the United States, there has been strong objection locally However, notwithstanding some progress, conditions in the Islands continue precarious There has been armed rebellion against the existing political regime, Communism is a growing threat, the economic situation is bad and during 1948 50 was deteriorating, standards of living are lower than before World War II, corruption in government circles has raised its ugly head, and American advice, guidance, and assistance still are needed Hardly less exposed to conquest than when they quickly succumbed to Japanese assault in 1942, the Islands certainly are not likely to see American precautions relaxed so long as the Red menace from the Asiatic mainland continues unabated

## SOME SPECIAL JURISDICTIONS

*1 Miscellaneous federal areas or establishments*

In addition to the territories and dependencies of varying status thus far touched upon (also large parts of the country embraced in the public domain), our national government has jurisdiction over other sorts of special areas To begin with, literally hundreds of federal military or naval stations, forts, arsenals, dockyards, parks, forest preserves, prisons, hospitals, asylums, post-offices, power sites, and other establishments dot the country, and over all such, by constitutional provision, Congress has exclusive legislative control, with managerial functions also, of course, in federal hands If the states exercise any functions in these areas or places, *e g*, by serving legal processes or taxing private property, they do so only with express congressional assent.

2 Indian reservations

A second and different category of special jurisdictions consists of over 200 Indian reservations, scattered through 21 states, covering some 82,000 square miles, and with not far from 400,000 inhabitants Gradual establishment of these segregated areas marked a relatively late stage in the long and troubled relations between white man and red man in this country, and the reservations themselves are not necessarily permanent, since sometimes (the inhabitants having become capable of owning their own land and managing their own affairs) a reservation is terminated and administratively absorbed into the state in which it is located The constitution merely gives Congress power to regulate commerce with the Indian tribes " But on one basis or another authority has been found not only for gathering most surviving Indians into reservations but for full federal control over all such districts, however far it may be found desirable to go in particular instances in permitting the inhabitants, under federal supervision, to exercise rights of local self-government Acting essentially as a trustee, a Bureau of Indian Affairs, in the Department of the Interior, is in charge not only of health, education, vocational training, and the like, but of leasing forests, water power sites, and mineral lands, with proceeds turned over to the inhabitants, and the necessary field work is carried on by several thousand local superintendents, agents, and other officials (including many educated Indians) under regional supervision of five district superintendents

A change in Indian policy

For half a century, there was a definite objective of preparing the Indian population for full assimilation into American society, socially, economically and politically, and in pursuance of this purpose the government in 1871 stopped making treaties with separate tribes, during the next two or three decades encouraged allotment of land to individuals as private holdings and in 1924 made all Indians born within the country's limits American citizens Results, however, were disappointing After schooling, there was a tendency to relapse into the old ways of living, land holdings were improvidently sold and the proceeds squandered, and altogether it became clear that the program was outrunning the red man's taste and aptitude for the normal American way of life Adjusting itself to the discovery, the government therefore, about 20 years ago, abruptly changed its policy, and today, instead of seeking to break up tribal relationships and wipe out distinctions between Indians and other people, the aim is rather to foster the Indian social and institutional heritage —with education, vocational training, improved land use, and thrift still of course encouraged, but in ways calculated rather to lift the native culture, with its arts and crafts and community life, to a higher level and to make it more adequate economically than to supplant it

3 The District of Columbia

(a) Governmental arrangements

Lastly, there is the bit of territory comprising the seat of the national government, *i e*, the District of Columbia Formed originally from lands on both sides of the Potomac River ceded for the purpose by Virginia and Maryland the District, since the retrocession of Virginia's portion in 1846 under the mistaken impression that it never would be needed, has consisted of some 70 square miles on the Maryland side alone Selected after lively controversy, the area was first occupied in 1800, and over it the constitution gives Congress

power of "exclusive legislation," [11] as over any other place transferred to the national government Presenting some aspects of a state, others of a county, and certainly many features of a city, the District is no one of the three, but physically a heavily urbanized area, legally a municipal corporation, completely and directly controlled by the national government Devoid of any local legislature or council, it receives its laws and ordinances exclusively from Congress For an executive, it has three commissioners, of whom two are appointed by the president and Senate from among local residents for three-year terms and a third is detailed by the president from the Engineer Corps of the Army and for an indefinite term As a body, these three commissioners have extensive powers They appoint to numerous principal municipal positions, they have charge of police and fire departments, and make regulations for the protection of life, health, and property, they supervise the local public utilities, including gas, electricity, telephone, transportation, and water supply Schools are under a board of education appointed by the judges of a supreme court of the District, and a board of charities and the judges of a municipal court are appointed by the president For more than forty years prior to 1920, the cost of government was divided equally between the national treasury and the taxpayers of the District Then, however, the federal government's share was reduced to 40 per cent, and in more recent years its contribution (now taking the form of a flat yearly grant of $12 million) has been further lowered, until in fiscal 1950 it amounted to less than 9 per cent of the total District budget The people of the District raise the remainder by "taxation without representation"

(b) The question of home rule"

Many of the District s 797,670 inhabitants (1 457,601 in the metropolitan area) retain a legal residence in some one of the states and may vote there, usually by mail In the District itself, however, not even taxpayers are voters There are no locally elected officers, and the District as such, although represented on national party committees and in national nominating conventions, has no part in choosing the president or any member of Congress That, in general, it is desirable for the national capital to be situated in an area under exclusive national jurisdiction is commonly conceded In later years, however, opinion—warmly supported in the District—has been developing that the inhabitants well might be intrusted with more control of their own affairs and the burden of Congress correspondingly lightened, and continued agitation for 'home rule" (with many bills introduced in Congress, and one, advocated by President Truman, actually passed by the Senate in 1949) may in time bear fruit, although at present there is no definite prospect of its doing so

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# PART V

# State Government and Administration

## CHAPTER 35

# The States and Their Constitutions

The power and prestige of the national government must not be allowed to blind us to the immense importance still attaching to the states. After all, our nation is the *United States* of America, and while as a rule the activities of the national government chiefly attract attention and get headlines in the newspapers, the states nowadays make and enforce more regulations, render more services, employ more men and women, and spend more money, than ever before. Practically every citizen of the United States is at the same time a citizen of some state, as well as an inhabitant of a subdivision of a state called a county, and of some fraction of a county known as a town, township, village, borough, or city, and the governments touching him at the greatest number of points are those of his state and of local units which that state has created and endowed with power. Only through some acquaintance with these governments can one begin to comprehend what government means in the life of us all—to say nothing of understanding our federal system or the national government itself.

## FEATURES COMMON TO ALL STATE GOVERNMENTS

One well might approach a study of 48 separate state governments with a sense of futility, expecting to become lost in a wilderness of differing authorities, functions, and procedures. And truly enough our state, as well as local, governments show variations sufficient to make any full and detailed comprehension of them a challenging undertaking. Except at very few points, *e.g.*, Nebraska's one house legislature, the broad outlines of state government nevertheless follow a single main pattern, and the task now ahead of us will be simplified if at the outset we glance at some of the principal features which all 48 governments have in common.

**1. Legal equality**

The United States is a union of states on a footing of legal equality with one another. Wide differences in area, population, resources, and wealth exist, but no significant rights or privileges are enjoyed by one state which do not at the same time belong to all of the others. This "equality of unequals" is fundamental to our constitutional system.

**2. Native or inherent powers**

Although rigorously circumscribed by the express and implied limitations imposed in the federal constitution, and penetrated ever more deeply by federal controls, the sphere of state activity still is more extensive than that of the national government, and in that sphere each state is supreme—its powers native and inherent, not derived or delegated as are those on the national level.

**3 A written constitution**

Every state has a written constitution which provides for the principal organs of state (and usually local) government, defines their respective powers and functions, guarantees the civil rights of its citizens, and serves as a framework of fundamental law to which all state legislation and local ordinances or regulations must conform. A state is at liberty to put almost anything it sees fit into its constitution, except, of course, that any provision conflicting with the federal constitution, or with acts of Congress or treaties of the United States, will, upon being challenged in the courts, be held null and void.

**4 A single chief executive**

Every state has a single chief executive called the governor, who in all cases is elected by direct popular vote, except that (a) in Mississippi the usual procedure is somewhat modified by translation of popular votes into electoral votes, and (b) in both Mississippi and Vermont the final choice under certain circumstances is made by the legislature. The state governorship has descended directly from the office of governor as existing in colonial times.

**5 A representative legislature**

Every state has a representative lawmaking body composed of persons chosen by direct vote of the electorate, and usually called the "general assembly", although in New Hampshire and Massachusetts the name employed is 'general court,' a term inherited from the time when the general membership of the Massachusetts Bay Company, known as the general court, was the only lawmaking body in the Massachusetts colony.

**6 Bicameral legislative organization**

The legislature in every state except Nebraska is a bicameral, or two chamber, body, consisting of what are commonly called a house of representatives and a senate.[1] In the case of the original 13 states, the bicameral legislature developed naturally out of circumstances peculiar to the colonial period. The assembly, or popular branch of the colonial legislature, became the prototype of our present house of representatives, the governor and council, acting in a legislative capacity, became the prototype of the modern state senate. Without giving much, if any, actual consideration to the relative merits of one house and two-house legislatures, practically all of the states formed since 1789 have from the beginning employed the bicameral plan.

**7 Civil and criminal courts**

In every state there is an extensive system of courts for administering justice in civil and criminal cases, and for settling the estates of deceased persons. Everywhere, the highest of these tribunals, usually called the supreme court, exercises the right to declare null and void any act passed by the state legislature, or any ordinance passed by a city council, if found contrary to a provision of the state constitution, the national constitution, an act of Congress, or a treaty of the United States.

**8 Systems of law**

Louisiana retains the system of civil law established there in the days of French rule, but in all other states the basis of jurisprudence is the common law inherited from England. Statute law naturally differs from state to state, but the legal foundations are the same in all except Louisiana.

**9 Separation of powers**

Like the national government, all state governments are organized on the theory that governmental functions fall into three basic categories—executive, legislative, and judicial; that each of the three should be assigned to, and exercised by, a distinct branch or department of government, and that no branch or department should exercise powers assigned to either of the others.

**10 Checks and balances**

Again as in the case of the national government, however, checks and balances operate to prevent the principle of separation from being adhered to with complete fidelity, each of the three branches being provided with means of defense against encroachments upon its proper sphere by either of the other two.

**11 Local governments**

Lastly, every state is divided into local government areas called counties, except in Louisiana, where the name 'parish' is used instead, and within counties or parishes are towns or townships, villages, boroughs, cities, and often several kinds of special districts. Everywhere the areas of local government derive their powers

[1] Nebraska's one house legislature dates from 1937. See p. 588 below.

from the state in which they are situated, and all are organized on the principle of popular control

## STATE CONSTITUTIONS—SOME GENERAL ASPECTS

Every state has a written constitution providing the legal basis for its system of government precisely as the federal constitution supplies a legal basis for the national government, and any legislative measure or administrative action found contrary to this fundamental law will be invalidated by the courts, on lines familiar in the federal sphere Some of the 48 documents—even those in operation in the older states—date from comparatively recent times, but most of the number have lasted from half to three quarters of a century, and two or three (although extensively amended) are, to all intents and purposes, of Revolutionary origin

Popular basis

Among the earliest constitutions, only those of Massachusetts and New Hampshire were framed by popular conventions chosen expressly for the purpose, and although there were a few other instances of at least informal popular ratification, the constitutions of the two states mentioned were the only ones making such action a prerequisite to adoption As new states later entered the Union, however, their constitutions were invariably framed by specially chosen conventions and submitted to popular vote, and every one of the 48 now in operation originated in this way, except that a wholly new constitution in Georgia and considerably revised versions in Virginia and two or three other states were put into shape for popular action by an appointive revisory commission rather than by an elective convention, and except, further, that in a limited number of instances, *e g* the Louisiana constitution of 1921, popular ratification (constitutionally required in fewer than half of the states) was omitted

Limits to state independence

Every state has, of course, a right to make its own constitution and to change it or substitute another for it whenever desired In exercising this broad prerogative, nevertheless, a state must keep within limits fixed by the general character of the national constitutional system as a whole, in making and amending its constitution, it no more may transcend the restrictions placed upon it by the national constitution than in performing any other of its functions Thus it may not authorize *ex post facto* legislation, or bills of attainder, or the issuance of paper money, or laws impairing the obligation of contracts, or any form of government other than "republican," because in the federal constitution all states are expressly forbidden to do any of these things When scanning the constitution under which a territory seeks to enter the Union, Congress will look closely to see that it contains nothing incompatible with the federal fundamental law, and if anything of the kind is found, will require whatever is objectionable to be removed before approval is given

General similarity

It would not be expected that 48 constitutions for states (a) dating from widely separated periods, (b) in some cases very large and in others very small, and (c) in some instances populous and highly industrialized but in others thinly peopled and almost entirely agricultural, would be in all respects

alike There is, nevertheless, a conspicuous family resemblance The very fact of statehood imposes certain fundamental features upon all, all reflect political ideas and objectives more or less common to a homogeneous people, and constitution makers have been prone to copy not only form but even phraseology from fundamental laws already tested in other states [2] As a result, the chief differences found are in matters of relative detail, with which, indeed, many later constitutions are gravely overcrowded

## A CONSTITUTION'S CONTENTS

Looking over any collection of state constitutions now in operation,[3] one finds a pattern of organization and content quite commonly as follows

1 Preamble

First, an often rather rhetorical preamble setting forth motives and objectives, with also in every case except Delaware a formal enacting clause

2 Bill of rights

Next (in the majority of instances), a series of articles or clauses comprising a bill, or "declaration," of rights—rights viewed, however, not as *conferred* by the constitution, but rather as preexisting and merely confirmed and guaranteed In the older documents, this is likely to include a statement of political theories in vogue in the late eighteenth and early nineteenth centuries—theories and axioms which in some instances still are generally adhered to, but which in other cases have been relegated to the lumber-room of discarded platitudes The newer constitutions usually either omit these high-sounding affirmations, as being more or less unrealistic and affording little actual protection against misuse of governmental power, or present them in a revised, modernized form More important, at any rate, are the provisions relating to certain concrete fundamental rights of the citizen, such as religious liberty, freedom of speech and press, the right to keep and bear arms and to be exempt from unlawful searches and seizures, the privilege of the writ of *habeas corpus*, and the right to bail and to trial by jury, also clauses forbidding *ex post facto* laws, bills of attainder, laws impairing the obligation of contracts, cruel and unusual punishments, and deprivation of life, liberty or property without due process of law Many of these provisions merely duplicate restrictions imposed originally upon the national government alone by the first eight amendments to the federal constitution, but now—in the cases of freedom of speech, press, assembly, and religion—judicially held to apply to the states as well under the due process clause of the Fourteenth Amendment Several of the number therefore are superfluous, some, *e g* , those requiring use of grand juries and unanimous verdicts by trial juries, raise serious obstacles to the prosecution of crimes under modern conditions

The main body of a constitution, however, is devoted to (a) an outline of the general framework of government, state and local, with provision for

[2] Another modest influence in the direction of uniformity is a 'model state constitution prepared by the National Municipal League s committee on state government and published originally in 1921 Issued in five successive ed tions (the most recent dating from 1948) this interesting document represents the considered opinion of several of the country s ablest students of state government and while no state even was expected to adopt the model in its entirety, its influence often can be detected in current amendments and revisions

[3] Two such collections, although not up to date are cited on p 584 below

the three familiar branches (with usually a separate article devoted to each), definition of functions and powers, and specification of principal organs or agencies through which powers are to be exercised, (b) in conjunction with this (though often placed next after the bill of rights), one or more articles fixing qualifications for voting and to some extent regulating procedures to be followed in elections, (c) provisions relating to taxation and other aspects of finance, usually imposing limitations upon the legislature, as, for example, in incurring state indebtedness, (d) provisions (in some of the new constitutions running to several pages) laying down the principles to be followed in chartering corporations and regulating corporation practices and procedures, and (e) articles, of increasingly ample scope in many later constitutions, dealing with the organization and role of state and local authorities having to do with education, health, social insurance, conservation, and other activities falling within the wide confines of public welfare

3 Governmental structure and functions

Sometimes such matters as finance, corporations, education, labor, and local government are dealt with at length in separate articles or sections, in any event, various miscellaneous subjects are likely to be so treated, and invariably there will be at some point explicit provisions on the way or ways in which the constitution may be amended or revised[4]

4 Miscellaneous

## THE PROBLEM OF EXCESSIVE LENGTH

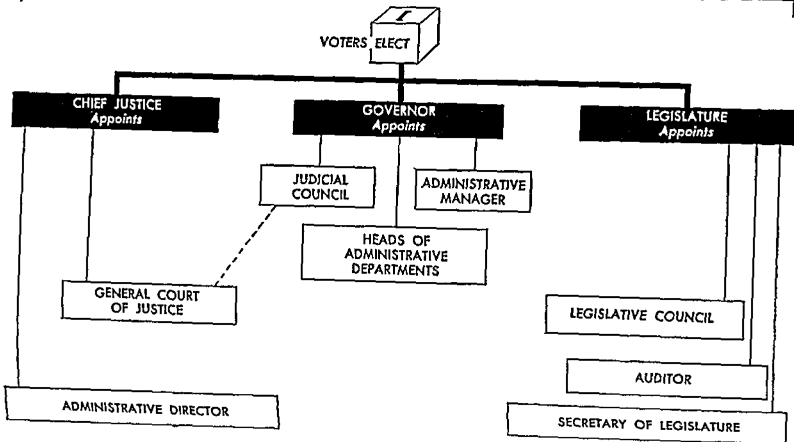
Naturally, state constitutions vary considerably in contents and therefore in length But all are long documents, even the shortest make the national constitution look somewhat scant The earliest ones, it is true, were comparatively concise, with only two exceptions, the 10 shortest ones in effect today were adopted before the Civil War[5] On the other hand, all of the nine longest ones have been adopted since the Civil War, and six of them since 1900[6] From the 5,759 words of the Vermont document of 1793, constitutions now run all the way to 63,179 words in Louisiana, and 72,000 (over 200 pages of print) in *California*[7] *The National Municipal League's 'model state* constitution" contains 12,000 words but only 12 of the existing 48 documents are as brief as this

An unfortunate trend

State constitutions thus have grown lengthier the country over in recent decades, and especially in the past 40 years[7a] The development is unfortunate, but reasons are not difficult to discover One is the vast expansion of the

Some reasons

## GOVERNMENT UNDER THE MODEL STATE CONSTITUTION



functions of government, resulting in ever growing numbers of subjects on which, rightly or wrongly, it is considered that a constitution ought to have something to say Another is lack of public confidence in legislatures, inherited in part from the nineteenth century when in too many instances legislatures "ran wild," plunging states into debt, prodigally enacting special legislation conferring unjustifiable benefits on railroads and other private interests, and in other ways demonstrating their unfitness for exercising the broad powers conferred on them in earlier days of greater confidence Legislatures are perhaps not quite so much distrusted now as formerly But there still is a strong disposition to guard against harmful things that they might do by tying their hands with restrictive constitutional clauses, especially in such fields as taxing, borrowing, and spending On the other hand constitutions are fattened with clauses aimed, not at preventing action, but at getting things done Some of these are aimed in the direction of the courts, and take the form of provisions designed to overcome or forestall obstacles to legislation interposed, or in danger of being interposed, by judicial decisions Any actual or possible legislation apparently threatened with judicial invalidation can be saved by provisions making it definitely constitutional, or even more surely by writing the substance of it into the constitution itself

The general result is that while, when a constitutional convention first assembles, most of its members are likely to profess loudly (and perhaps sincerely) their devotion to the idea of a shorter, more compact, fundamental law, all soon are found insisting upon detailed provisions on matters in which they or their constituents have a special interest, or which for other reasons they happen to regard as of high importance—with the end product usually proving a more voluminous and crowded document than the one to be replaced And of course the more detail that is worked into a constitutional text, the oftener it becomes necessary to amend and add something more

The desirability of shorter constitutions

Simplifying the state constitution by eliminating all but fundamentals is not a matter of mere academic interest, it is a reform of great practical importance, for at least four reasons (1) Constitutions encumbered with dreary and often unimportant details, become so unwieldly and bewildering that almost nobody except lawyers even tries to understand them (2) Inserting legislative matters in a constitution is a good deal like locking up one s last will and testament in a safe deposit box and throwing away the key Reconsideration, change, and reform are made doubly difficult, perhaps impossible, for to the ordinary delays and difficulties of obtaining legislative action is added the necessity of securing a constitutional amendment—never an easy thing to do (3) The increased number of subjects placed beyond the reach of the legislature has been responsible for much of the widespread popular criticism of the courts for declaring acts of the legislature unconstitutional With shorter constitutions, fewer situations would arise tempting the courts to overturn legislative enactments Finally, (4) from the expanded state constitution some courts have developed a doctrine of implied or resulting limitations which still further ties the hands of the legislature on many occasions when action is desired According to this judicial theory, the mere fact that a subject has been placed

in the constitution indicates an intention on the part of the constitution makers to take it entirely out of the hands of the legislature, and therefore is an implied denial of any legislative right to deal with any phases of the subject unless there is some express authorization in the constitution itself It should be added, however that this doctrine does not obtain everywhere, in some states, the courts have held that the legislature has all power not denied to it by the state (or, of course the national) constitution

The future of state constitutions

The future seems to promise two possible lines of development If the present tendency to incorporate in the constitution matters not of fundamental importance but primarily of a legislative character, and to deal with these matters in detail, continues unabated, more and more frequently will amendments become necessary in order to meet changing conditions This in turn might be expected to lead to the adoption of easier amending processes (the trend already is in that direction), *i e*, processes increasingly resembling those employed in the enactment of ordinary statutes either by the legislature or by direct popular action through the initiative and referendum, and in this way, the historic dividing line between constitutional and statutory law might become more and more hazy, if not quite indistinct, until at length substantially the same procedure for the enactment of both would be arrived at On the other hand, we may see a reaction in favor of shorter documents dealing only with matters of a fundamental and truly constitutional nature Should this come about—the indications that it will do so are not too impressive—there obviously will be less need for frequent amendment, and the present sharp distinction between the modes of adopting constitutional provisions and ordinary statutes may be expected to continue to be reflected in rather difficult amending procedures

## CONSTITUTIONAL AMENDMENT

No constitution can be so well planned and drafted that it will not in time require change, and the problem is to provide methods of change that will not be so easy as to impair the instrument's usefulness as a stabilizing force in government and at the same time not so difficult as to block progress

There must, of course, be ways of *proposing* changes and ways of *adopting* them, and while in the great majority of instances the method of adoption is the same, namely, popular ratification, methods of proposal may, and do differ considerably, depending primarily upon whether what is sought is merely a single change (at any rate a limited number), *i e*, simply *amendment*, or a more general overhauling, perhaps a complete rewriting, *i e* *revision* In the one case, methods employed are (1) independent legislative proposal or (2) popular initiative, in the other, (1) legislative proposal based on work by a revisory commission or (2) a constitutional convention Under any method, a more protracted and laborious procedure is involved than for merely amending or repealing a statute [8]

[8] What is said here will relate to changes in constitutional texts only But it must not be overlooked that like the national constitution actual operating state constitutions change and

*1 Legislative proposal*

To speak of amendments first in every state except New Hampshire, they may be proposed by the legislature,[9] and this is the commonest method even where the popular initiative also is in use In 34 states, an amendment is ready to be submitted as soon as a single legislature has acted upon it favorably With a view to more caution (including opportunity for the voters to express themselves on pertinent matters at an intervening election), 13 states, however, require approval by two successive legislatures, and in Delaware (where alone there is no submission to the voters) this completes the process In 18 states only a simple majority of the members of each house is required for submission but in 25, either two-thirds or three fifths, and such higher requisites, of course raise an additional hurdle As a rule, legislatures may propose any number of amendments at any time In Illinois, however, no legislature may in any one session propose more than three (prior to adoption of a "gateway amendment in 1950, not more than one), in Indiana, Kentucky, Kansas, and a few other states the maximum at any one election is two, three, or some other small number, and New Jersey, Tennessee, and Vermont permit submission only once in five six, and ten years, respectively

*2 Popular initiative*

Another method of getting an amendment, or series of such, before the voters is the popular initiative, and, as employed for this purpose, the device —starting in Oregon in 1902—is available in a total of 13 states, the latest adoption (and the only one in an Eastern state) being in Massachusetts in 1918 To bring a popularly initiated proposal to a vote, there must be either a definite number of signatures to a petition, as 20 000 in North Dakota and 25,000 in Massachusetts, or a number equal to a certain percentage (usually from 8 to 15) of the total vote cast for some specified state office at the preceding election, and any proposal so sponsored goes into effect as a part of the constitution if endorsed by the people at the polls Ordinarily, the legislature has no part in the procedure In Massachusetts however, a popularly initiated amendment goes first to the legislature and reaches the people only if at least one fourth of the full membership of two successive legislatures, in joint session, indicates approval, furthermore the legislature may, if it likes, submit to the voters a competing or substitute proposal In most states, popularly initiated amendments may relate to any provision of the constitution whatsoever In Massachusetts, however various clauses are protected against change by this procedure, *e g*, those relating to the courts and to civil liberties

*3 Requirements for ratification*

In all states except Delaware and South Carolina, amendments become effective upon being ratified by the voters,[10] and in three fourths of the number, a simple majority of the votes cast *on the amendment* suffices In 12 states, however, something more is required—sometimes (as in Minnesota and four other states) a majority of all votes cast *in the election* at which

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grow also through executive legislative and judicial interpretation and through custom or

amendments are submitted, and the difference is significant, because invariably a good many people vote only for candidates listed on their ballots and entirely ignore constitutional proposals With a majority of all votes cast essential to ratification, abstention has the same effect as a vote in the negative, and favorable action often becomes difficult if not impossible In states employing the plan, many a desirable amendment, although perhaps with votes for it outnumbering those against it, has gone down to defeat

4 Numbers of amendments

From Tennessee, whose constitution of 1870 never has been amended,[11] the number of amendments adopted in the various states ranges upwards well into the hundreds, although dating only from 1921, Louisiana's fundamental law has been subjected to 287 amendments (to 1949), California's constitution of 1879, to 312 (to the same date) In general, the constitutions amended less frequently are the older and briefer ones, and of course those prescribing more difficult amending procedures, while those most freely amended are the ones authorizing easier procedures and especially those (as in the two states last mentioned) running to great length and crowded with detail—for details require more frequent change than fundamentals Adding to legislative proposal the method of proposal by popular initiative has tended to multiply amendments in certain states, but not greatly, between 1904 and 1938, the total of popularly-initiated amendments, the country over, was only 109 (24 of them in Oregon) [12] Altogether, it appears that between 1900 and 1935 approximately 2,500 amendments were submitted to the voters, of which about 60 per cent were adopted

## CONSTITUTIONAL REVISION

Special devices employed

When only specific amendments are desired and the machinery for obtaining them has proved workable, legislative proposal, with the popular initiative as an alternative, is the natural approach When, however, the need is for a general revision, it is almost necessary to resort to a constitutional convention, or at any rate, in lieu of it, to a revisory commission The people in the mass cannot make a constitution or even rewrite one, the legislature has too many other things to do, even if constitution-making were properly within its province, and to our American way of thinking, making, or even revising, a constitution is so solemn an undertaking that ordinarily only a body chosen by the people expressly for the purpose ought to be intrusted with it Significantly, therefore, the constitutions of approximately three-fourths of the states provide procedures for convoking conventions, and even where this it not true such assemblies are validated by practice and judicial construction Moreover, the convention technique has been used freely—nearly 200 times during our first century and a half, and once or more in every state There are periods in which, regardless of how many constitutions

[11] In August 1952 the people of the state will vote on the question of holding a convention

have become cluttered up with amendments and with obsolete or unworkable clauses, little or nothing happens, the interval between the two world wars was such a time of constitutional stagnation Other periods follow, however, in which, for whatever reasons, states are stirred to activity, and it is gratifying to find that we now are in a period of this sort, with new or revised constitutions adopted in three states within less than a decade (Missouri and Georgia in 1945 and New Jersey in 1947), and with preparatory work going forward in at least half a dozen other commonwealths [13]

1 Constitutional conventions

(a) Call

In the great majority of cases, the first formal step toward holding a constitutional convention is a decision by the state legislature to submit to the voters in a state-wide election the question of whether they desire one, although in some states the question may be placed on the ballot also by initiative petition In any event, if the people so ordain, the call is issued by the legislature in the form of a statutory enactment Periodical submission of the question is required in eight states, namely, in New Hampshire (where a convention is the only means of proposing a constitutional change) every seven years, in Iowa, every 10 years, in Michigan every 16 years, and in Maryland, Missouri, New York, Ohio, and Oklahoma, every 20 years—although in all of these states except Maryland and New Hampshire, the question may be submitted also at other times In most states, it may be submitted whenever the legislature sees fit

(b) Membership

With a constitutional convention called, the legislature makes all necessary provisions for the nomination, election, convening, and compensation of delegates, and for submission of their work to the voters As a rule, however, delegates are chosen from existing legislative or senatorial districts (with perhaps a few from the state at large),[14] and under the regular primary and election laws, sometimes modified for the purpose as in Massachusetts, to introduce the nonpartisan principle Numbers have varied from some 80 to over 400, but usually have not exceeded 200

(c) Organization

Assembling almost invariably at the state capital, a convention organizes by electing one of its members president, creating a staff of clerks, secretaries, and stenograhpers, and adopting a code of rules Too numerous for detailed consideration of the great variety of subjects requiring attention, it necessarily works largely through committees, of which 10, 15, 20, or more commonly are appointed by the president, although in a few instances assignments have been made by a special committee set up for the purpose

(d) Procedure

In general, the proceedings of a convention follow the same pattern as those of a state legislature (except as procedure in the latter is affected by the existence of two houses), and particularly is this true of the functioning of committees To each committee is customarily assigned one or more sections or

articles of the existing constitution, and all proposed changes (numbering 377 in the Missouri convention of 1943-44), originating either with members of the convention or with people outside are referred to the appropriate committee for preliminary consideration Committee sessions often are thrown open to the public and almost always opportunity is given both advocates and opponents of proposed changes to present their respective arguments If a committee approves a given proposal it is reported to the convention perhaps in somewhat amended form and then placed on the calendar for consideration in committee of the whole Constitutional conventions are presumed to carry on their work with less political strife than frequently characterizes the proceedings of a legislature and it is to promote this that in a few states the members are elected on nonpartisan ballots The theory however is not always borne out in practice the New York convention of 1938 for example was marred by flagrant partisan wrangling [15]

(c) Authority

Constitutional conventions are indeed legislative bodies with the primary if not sole function of drafting new fundamental laws or formulating amendments to existing ones Some conventions like that in Illinois in 1862 have gone farther and assumed more or less actual management of the state government displacing existing officers substituting others chosen by the convention and attempting for the time being virtually to take the legislature's place At other times the legislature has attempted to impose limitations which a convention has wholly or in part disregarded

Naturally conflicts have resulted and out of them three theories have developed According to the first the legislature is supreme, and in the act of calling a convention may limit the powers of that body by barring amendments to specified sections of the constitution by requiring it to propose amendments to certain other sections by prescribing the manner in which its work shall be submitted to popular vote and in other ways Persons who take this view hold that the convention has no right to disregard or to deviate from any of these statutory restrictions According to a second theory the convention has all the sovereign powers of the people and accordingly is during its period of existence the supreme authority in the state Thus superior to the legislature and to all other branches of the state government it may disregard any or all limitations which the legislature has sought to impose and may indeed legally exercise whatever governmental functions it cares to assume—as the Illinois convention of 1862 tried to do

Best opinion on the problem

Each of these two theories has some support in convention precedents and in judicial opinion But the view now most generally held is that a convention is neither sovereign nor wholly subject to the legislature—that on the contrary the two are coordinate bodies each supreme within its proper sphere and bound by the provisions of the existing constitution and statutes If the constitution of a given state authorizes the legislature to impose restrictions

[15] Conventions rarely complete their task in less than two or three months and sometimes last considerably longer Work may be expedited and certainly better quality assured by advance assembling of necessary information and materials as in 15 bulletins prepared for the Illinois convention of 1920-22 12 bound volumes compiled for the New York convention of 1938 eight manuals" prepared for the Missouri convention of 1943-44 and 30 monographs prepared for the New Jersey convention of 1947 Sometimes however no such aids are provided

on a convention, the latter is obligated to respect any resulting limitations In the absence of such authorization, however, no binding restraints can be imposed In any case, a convention may neither displace any existing organs or agents of state government nor exercise any of the powers assigned to them, its functions are confined to proposing a new constitution or amendments to the existing one

*(f) Submission of a convention's work to the voters*

Notwithstanding that only 19 state constitutions so require, the results of a convention's work are almost (but not quite) invariably submitted to the voters for their approval before taking effect, and the vote necessary for ratification almost always is the same as that required for adoption of amendments proposed by the legislature

*Three methods employed*

A convention may submit its work in one of three different forms (1) It may present it as a series of specific amendments, to be voted on separately, as in New York in 1938, although this is hardly practicable except when only a comparatively small number of changes are proposed Or (2) it may submit a complete new or revised constitution, to be accepted or rejected as a whole, as in New Jersey in 1947 This method has the serious disadvantage of compelling changes not widely opposed to suffer the same fate as articles relating to controversial matters Opposition to the initiative and referendum, or to some change in the system of taxation, for example, may be so strong that, rather than see such a proposal adopted, its opponents will vote against the entire document, although every other feature may be entirely satisfactory, and the sum total of such fractional opposition may mean the constitution's defeat In this cumulative fashion, a proposed new constitution for New York was wrecked in 1915 and one for Illinois in 1922 Finally, (3) a substantially complete revision may be submitted as a single document to be ratified or rejected as a whole with at the same time one or more especially controversial sections presented separately This enables the electorate, if so inclined, to approve the greater part of a convention s work while nevertheless rejecting particular features Such a plan was followed in Illinois in 1870 when eight separate articles were submitted along with a new and substantially complete constitution

*2 Revisory commissions*

*(a) Nature*

Although still indispensable, the constitutional convention is, at best, a cumbersome and expensive device, and in some states impossible to authorize elect, and assemble, with its work submitted to the voters, in much less than three or four years An alternative instrument has therefore been coming into favor in the form of a revisory commission, authorized by the legislature and reporting back to that body a constitutional draft to be placed before the electorate precisely as if it came from a convention No constitution, it is true, expressly authorizes this procedure But it has been employed in scattered instances for almost 100 years and seems to be fully within the legislature's scope of authority over the constitutional process

How the device operates can best be illustrated by recent experience in Georgia By 1943, the 60 year old constitution of that state had become hopelessly cluttered up with amendments, most of them relating to matters of only local concern, 179 had been adopted in the preceding five years alone

Instead, however, of planning for a constitutional convention (as Missouri recently had done), the legislature authorized the creation of a "commission to revise the constitution",[16] and in 1944, the resulting body, composed of state officials, members of the legislature, representatives of the judiciary, and members at large appointed by the governor—23 persons in all, with the governor as chairman—began appointing committees, making studies consulting experts, and holding hearings, eventuating in 1945 in a liberalized and modernized fundamental law approved by the legislature (with some alterations), adopted by popular vote, and forthwith put into effect

(b) Advantages

Revision by commission is, of course, far less expensive than by convention (conventions cost from half a million to a million dollars), the commission can be made up so as to contain a higher proportion of persons intimately acquainted with the state's affairs, its small numbers promote intensive and thorough work, and while the objection sometimes is raised that it is less democratic because its members are few and not chosen directly by the people, the criticism loses much of its weight when it is remembered that a new or revised constitution coming from the hands of a revisory commission can be placed before the people for adoption only by the popularly elected legislature, and not at all unless that body approves it[17]

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[16] A practical factor in the decision was a rural minded legislature's aversion to legislative reapportionment which a convention might propose A commission it was believed could be controlled

[17] Constitutions framed by revisory commissions are ratified or rejected under the same regulations as those framed by conventions For a comparison of commission and convention methods see B M Rich Convention or Commission? *Nat Mun Rev* XXXVII 133 139 (Mar, 1948)

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## CHAPTER 36

# The Legislature—Structure and Powers

*The legislative function*

On both national and state levels, policy is determined primarily by the legislature and carried out by the executive, the administrators, and the courts, and since policy must be made before it can be given effect, both the national constitution and 45 of the state constitutions are logical in placing the main article on the legislature ahead of those devoted to the executive and the judiciary Coming direct from the people and, presumably reflecting their will, the legislature of a state decides what activities and services the government shall undertake (except in so far as predetermined by the state constitution), provides for officers, boards, commissions, and other authorities requisite for carrying on such activities and services, determines the amounts of money to be spent for the various purposes, devises and adopts means of obtaining it, and appropriates it to the proper spending agencies More or less cognate to this great central function, the legislature also often shares in powers of appointment and removal, undertakes investigations, conducts impeachments, canvasses the results of elections, and in any event enacts the basic civil and criminal law operating in the state, except in so far as such law is of federal origin or embodied in the underlying common law In doing all this, the legislature becomes, as it were, a central power station generating the energy which sets in motion and drives most of the machinery, not only of the state government, but of county, municipal, and other local governments as well

## THE BICAMERAL SYSTEM

*Origin and development*

Every state legislature, except that of Nebraska, is organized in two houses, both elective,[1] and both endowed with substantially the same powers In the original states, the bicameral arrangement developed naturally out of the conflict between aristocratic and democratic elements in the colonial period, and at the close of the Revolution it prevailed in all except Pennsylvania and Georgia [2] In the states later admitted to the Union, the plan was followed in almost automatic imitation of the older states, or of the national Congress,

[1] [illegible] the [illegible] nes [illegible] nal

[2] Four of the oldest states have at one time or another had a unicameral legislature Delaware, until 1776 Pennsylvania until 1790 Georgia 1777 1789 and Vermont until 1836

and with little perception of its diminishing advantages for state purposes Under the earliest state constitutions, there were higher property and age qualifications for membership in the state senate, and for the privilege of voting for senators, than in the case of the other legislative branch, so that the two houses were chosen by different constituencies and represented somewhat different social and economic groups or interests This distinction, however, long ago disappeared, and practically the only differences today between the two houses are the longer term for which senators usually are chosen,[3] the often slightly higher age or residence qualifications for senators, the larger districts from which they are typically elected, and the frequent rotation of senatorial terms so that not all will expire at the same time With electorates identical, and in some states senators and representatives even chosen from the same set of districts, "each chamber is a mere duplication of the other, neither is more conservative or radical than the other, each is subject to the same influences, and thus it has come about that the state employs two substantially identical organs to perform the same functions "[4] Preservation of the bicameral system under these changed conditions has to be justified, if at all, mainly on the ground (1) that it permits representation in one house based primarily on distinct geographical units (such as counties) and in the other on quotas of population, or (2) that it prevents undesirable legislation by insuring double consideration for all laws prior to their enactment.

Should two houses be retained?

Undoubtedly the two house arrangement lends itself in some states to a certain balance of power (not always a just one) through weighting one house with representatives of areas and the other with representatives of population Persons defending it are more likely, however, to lay stress upon the checking, or revising, precautions which the plan is supposed to insure For entirely satisfactory conclusions on this point, there is need for study, in a number of typical states, of the actual rejections and amendments by each house of measures originating in the other Unfortunately, such investigations have been made in only a few states[5] The reported statistics constitute no very impressive argument for two branches If the same party is in control of both, there is likely to be approximately the same leadership in both and little check of one upon the other, conversely, if the two are controlled by different parties, checking is likely to be overdone, with a result of deadlocks slowing up or preventing desirable action If, too, one recalls that everywhere except in North Carolina the governor has the power of veto, that in nearly half of the states the popular referendum affords a check, and that the courts everywhere long have been freely exercising the power to declare enacted measures unconstitutional, it is not easy to avoid the conclusion that—in view of the admitted evils which accompany the system and in some instances are inseparable from it—the value of bicameralism as a means of setting up an additional hurdle over which legislation must pass hardly is sufficient to

[3] In 32 states the term of senators is four years in 15 others two years and the term in the [illegible] two years. The term of members of the lower house is [illegible] years in all other states

[illegible] *lings in American Govern* [illegible]

[illegible] New Mexico

warrant its retention, especially in states where there is no sharp differentiation between urban and rural elements of the population [6]

Advantages of the unicameral plan

The advantages of the one-house system are unmistakable In the first place, it enables public attention to focus promptly upon a narrow and well defined area, and therefore permits of a genuine scrutiny of legislative proceedings while laws are being made—a thing practically impossible in the case of our present large two-chamber legislatures with their multitude of committees In the second place, when there is but one chamber, responsibility cannot be bandied back and forth between two houses, members of one house working with members of the other to defeat legislation, and putting it beyond the power of the public to know exactly what has happened Duplication of committees furnishes abundant opportunities for shifty deals further delaying action, beclouding issues, and dissipating responsibility Friction and deadlocks between the houses would cease when two houses no longer existed, and the cost of supporting the legislature would be reduced

The experience of Nebraska

For reasons such as these, the great majority of American municipalities (including nearly all of over 30,000 population) now have adopted the single-chamber plan for their councils On the state level, the bicameral tradition is hardier Nevertheless, in 1934, Nebraska, after years of agitation vigorously led by the late Senator George W Norris, brought to a vote a popularly initiated constitutional amendment providing for a legislature of but a single house, and after a stirring campaign the proposal triumphed, with the new plan taking effect in 1937 and the state becoming the first to operate on a unicameral basis in more than a century Now sitting at Lincoln, therefore, is a single body of 43 members (called "senators"), chosen in nonpartisan elections and serving two year terms Moreover, after a decade and a half, the plan is giving general satisfaction, with membership improved in caliber, the flood of bills reduced by almost half, procedure streamlined, the last minute rush at the close of a session largely eliminated, responsibility more definitely established, the quality of output raised, and costs to the state materially reduced Not all of these gains are to be attributed exclusively to unicameralism Nonpartisan elections have helped, and an exceptionally efficient legislative council which prepares a legislative program in advance of each session, drafts bills, and supplies leadership has contributed materially, as indeed similar councils have done in other states [7] But the single chamber experiment has succeeded, Nebraskans are pleased with its results, and other states, especially when framing new constitutions, would do well to pay more attention to it

[6] [illegible]

[7] See p 606 below

## REPRESENTATION IN LEGISLATURES

Size of the two houses

The number of legislative members is determined the country over by no one method and according to no single principle, and while a state constitution usually lays down some guiding rule, apportionments of both representatives and senators are made and numbers fixed, by the legislature itself (usually), subject only to broad limitations or none at all Quite generally, numbers are excessive for purposes of deliberation Senates, it is true—ranging from 17 members in Delaware and Nevada and 19 in Arizona to 56 in New York and 67 in Minnesota—are usually kept within bounds, although the last-mentioned numbers are rather higher than desirable Lower houses, on the other hand, are commonly far too large, with the result that much power in determining both the form and the substance of legislation has perforce to be lodged in more or less irresponsible committees Delaware and Nevada have lower houses of suitable size for deliberation, *i e* 35 and 43 members respectively At the other extreme stand Vermont, Connecticut, and New Hampshire, with 246, 272 and 399 members, respectively More than half of the states have lower houses of over 100 members [8]

Bases of representation

One of the most difficult, and sometimes most poorly performed, tasks in state government is the apportionment of representation in legislatures—complicated as it is in all states except Nebraska by the necessity of making provision for two separate houses When the oldest states were formed, representation was based simply on geographical units towns in New England and usually counties elsewhere were given a substantially equal number of representatives, and no grave injustice resulted so long as differences of population remained small As, however, some towns or counties outstripped others, serious inequalities of representation arose, and while many such still exist, all states now make some attempt at achieving equity In a few of the 48, *e g*, Illinois and Minnesota, the same units are employed for representation in both houses As a rule, however, there are two differing although perhaps overlapping, sets of units For the lower house, the unit usually is the town in New England, the county elsewhere although a populous town or county may be allotted two or more seats, while two or more contiguous units with fewer people may share a single seat For purposes of the senate, a populous county may be entitled to a seat separately, or even be subdivided into districts, each with a seat But more commonly two or three (or more) contiguous counties

trarily allots one (and only one) seat in the lower house to every 'inhabited town," and Connecticut, which allots two to every town incorporated before 1950, some of them now only hamlets [9] To be sure, nearly all states provide in

[8] For a full tabulation see Council of State Governments *The Book of the States 1950-51* (Chicago 1950) 112 The total number of members of the 48 legislatures in 1950 was 7 636

[9] In Connecticut 20 cities and towns containing two-thirds of the state s population elect but 90 of the 272 members of the lower house

their constitution for a reapportionment for both houses following each decennial census or sometimes a state enumeration Even the most careful reapportionment, however, cannot create absolutely equal districts from highly unequal towns and counties Gerrymandering often distorts results And sometimes a legislature for a long period simply neglects or refuses to carry out the constitutional mandate, with no means available for compelling it to do so [10]

Discrimination against urban populations

A further feature of legislative representation is the frequent discrimination in one or both branches in favor of rural areas and against large urban communities, especially in California, Illinois, Maryland, Missouri, Michigan, New Jersey, New York, Pennsylvania, and Rhode Island Cook county (Chicago), for example, with nearly 52 per cent of the population of Illinois, has only 37 per cent of the members of either house, and Wayne county (Detroit), with nearly 40 per cent of the population of Michigan, has only seven out of 32 senators and 27 out of 100 members of the lower house [11] Nor is this sort of discrimination always directed against a single populous city Often it happens that urban sections, taken as a whole, are greatly under-represented in comparison with rural sections, especially when every county (or town), irrespective of size, is granted at least one or two members Rural interests differ from urban, a single vast city dominating the legislature (as New York or Chicago might do) would be a menace, cities are hotbeds of radicalism—such are points of view of rural-minded legislatures clinging to existing arrangements Minority rule is never defensible, reply urban dwellers—usually in vain In any case, the gross under-representation of urban populations, producing much of most states' wealth and paying a large share of their taxes, is an important political problem of our time

Representation of social and economic groups

In spite, however, of the situation described, our state legislatures, by and large, are as a rule reasonably representative of the different social and economic groups existing in the states Every degree of education is found, and in some legislatures the proportion of members who have had a high school, college, or university education is at times considerably larger than that prevailing among the people generally Almost every profession is represented, and almost every conceivable business activity, although lawyers and farmers usually outnumber members following other vocations, and manual laborers are scarce or non-existent The majority are men in the prime of life, between 35 and 50 years of age, although now and then a young man barely a voter, or an octogenarian, appears Every phase and degree of political experience is represented also "those who have been only voters, those who make politics a business, those who are ardent partisans, and those who are politically torpid, the conservative and the demagogue—all are intermingled in these

[illegible] steps to [illegible]

in the lower house

representative bodies" Even foreign born citizens have hitherto been well represented And since the adoption of national woman suffrage, women legislators have appeared in increasing numbers, in 1949, a total of 214 women served as members of legislatures in a total of 39 states [12]

Suggestions for proportional representation

No one can successfully contend, however, that all shades of *political opinion* at present find representation in our legislative bodies With few exceptions senators and members of lower houses are chosen in small, single-member districts, with the candidate who secures a simple plurality of the popular vote usually winning the seat In any district there is likely to be a large minority—even a majority when the votes are divided among the candidates of three or more parties—that has no spokesman of its point of view in the legislature, and in the aggregate such 'unrepresented' elements in a state may be both numerous and important A remedy often suggested is the adoption of proportional representation under which members of the two houses would be chosen from districts returning three, five or even more, seats would be allotted in accordance with the strength shown by the various parties at the polls, and minorities would have a chance to win at least a few of the number A *Proportional Representation League has long urged adoption of such* a plan for both state and local purposes, the successive groups of political scientists that have formulated and periodically revised the National Municipal League's "model state constitution have consistently advocated the same thing, and some popular sentiment favorable to the scheme has been created Its actual use in this country, however, has as yet been confined to about a dozen municipalities, mostly small [13]

## THE LEGISLATURE'S POWERS

*Lack of definition*

Earlier in this chapter, some hint was given of the scope, variety, and importance of a state legislature s activities Nevertheless, one may pore over one's state constitution from beginning to end without discovering any list of things that the legislature may do For, in every state the legislature has all powers not granted elsewhere not prohibited to states by the national constitution, and not expressly or impliedly withheld by the state constitution, and no *official enumeration of such indefinite powers* ever is attempted One will, of course, come across clauses in every constitution expressly conferring certain specific powers But such direct grants are exceptional, having usually been prompted by desire to meet some particular situation, as for example to offset the effect of a court decision, actual or possible, in interpreting general phrases in the constitution such as 'due process of law" Outside

[12] On the personnel of state legislatures see C S Hyneman 'Who Makes Our Laws? *Polit Sci Quar* LV 556-581 (Dec 1940) and W B Graves [ed] reference to *Annals* cited on p 598 below

[13] See p 702 below In electing the members of the lower house of its legislature, Illinois

of instances of this kind, however, the powers of the legislature seldom are specified, as parts of the general powers of the state, they are inherent, residual, and unenumerated, and discussions of them almost of necessity relate, not to what they are, but rather to what they are *not*, *i e*, to the restrictions by which they are circumscribed [14]

The basic police power

Before this approach is adopted here, however, one matter on the positive side requires a word of emphasis, i e, the legislature's authority to exercise the most fundamental of all state powers, namely, the police power Defined broadly, the police power is 'the power of the state to restrict individual freedom of action or free use of property, in order to protect the health, safety, morals good order, convenience, or general welfare of the state" [15] In exercising this primary authority, the legislature may restrict individual and corporate rights of liberty and property in almost any manner and to almost any degree, so long as the courts are satisfied that such restraints do not amount to deprivation of life, liberty, or property without due process of law, and statutes based upon the police power have multiplied in recent decades until they have become almost legion, with no end in sight Examples are to be found in laws regulating the manufacture and sale of intoxicating liquor, explosives, fireworks and firearms, laws for the suppression of lotteries, gambling vice, and immoral entertainments, laws licensing and regulating trades, industries, and professions, pure food and drug laws, laws authorizing quarantine and other health regulations, and laws empowering cities and other municipal corporations to suppress nuisances and to enact health building, zoning, billboard, traffic, and a multitude of other ordinances More often than not, when the validity of state legislation is tested in the courts, the question at issue is whether the proper bounds of the police power have been overstepped

## RESTRICTIONS UNDER WHICH LEGISLATURES WORK

Earlier freedom

Under our federal system, state legislatures always have been restricted at various points by the federal constitution, for example as to bills of attainder, *ex post facto* laws, impairment of contracts, and taxation of imports and exports In the earliest state constitutions, however,—framed in a period of sharp reaction against strong executive authority and of high popular esteem for representative bodies—practically no limitations were imposed other than those contained in the state bill of rights Only three of the number (those of Massachusetts, New York, and South Carolina) even gave the governor any veto power

Today, the situation is different, at any rate outside of New England, where, except for a few restrictions on financial powers and occasional directives relating especially to education and militia (added, of course, to

[14] What is said in the foregoing paragraph relates primarily to the legislature's lawmaking powers Functions of other sorts—touching appointments impeachment etc—are more definitely conferred

[15] R E Cushman "The Supreme Court and the Constitution *Pub Affairs Pamphlets* No 7 (New York 1936) 16-17

restraints from the bill of rights and the governor's veto), legislatures retain almost all of their earlier freedom. In constitutions of later origin, especially in the West and South, one finds a formidable array of express limitations, reflecting the lack of confidence in legislatures characteristic of the past century, and in practice considerably curtailing the broad powers attributed to such bodies in paragraphs above. Unquestionably some of these restrictions are wholesome, *e.g.*, prohibitions upon imposing property qualifications for voting, upon reducing salaries of judges during their terms, upon granting perpetual franchises to public service corporations, and the like. Others, however, are dubious, as for example provisions specifying the number, method of selection, duties, and powers of important state and county officers—provisions which sometimes go so far as to fix salaries and terms—with the result of such matters being placed almost entirely beyond the power of the legislature (and of the people locally) to change, and with short ballot reform made almost impossible.

The different situation today

1. Express restrictions

Moreover, to restrictions expressly imposed by constitutions have been added others evolved by the courts, *e.g.*, such principles as (1) that any clause empowering the legislature to act in a particular manner is to be regarded as a denial of its rights to act in any other manner, and (2) that every pertinent provision of a constitution is to be construed as limiting legislative power *to the greatest possible extent*; in other words, the doctrine that doubt is always to be resolved against, rather than in favor of, an asserted legislative jurisdiction. In probably a majority of states, the upshot of these remarkable interpretations is that, whereas in theory the legislature has all legislative power not denied to it by terms of the federal and state constitutions, in practice it has tended to become a body having only delegated powers, like the municipal council described in a later chapter. Few factors have contributed more to deaden popular interest in the legislature's work and to deprive the state of the services of its best citizens, than the shriveling of legislative power under express constitutional restrictions, reinforced by narrow judicial canons of interpretation.

2. Implied or resulting limitations

From a wide field may be selected for brief comment a few significant areas of direct restriction, as follows: (1) the frequency and length of legislative sessions, (2) legislative procedure and the form in which bills must be passed, (3) the enactment of special, local, or private laws, (4) financial legislation, and (5) the partial or complete by passing of the legislature through use of the initiative and referendum.

Some principal areas of restriction

1. Frequency and duration of sessions

In early days, it was customary to provide for annual elections and for annual legislative sessions. Now, however, legislators nowhere are elected annually, and only 10 states—Arizona, California, Colorado, Maryland, Massachusetts, Michigan, New Jersey, New York, Rhode Island, and South Carolina—have annual sessions.[16] In 38 states, sessions are biennial (usually in odd numbered years), with special sessions possible whenever called

[16] This, however, represents an increase by five (California, Maryland, Michigan, Colorado, and Arizona) since 1946. In California, Colorado, and Maryland, even year sessions are confined to budgetary and tax matters.

Furthermore, 26 states now have a constitutional limitation upon the period during which the legislature may sit With variation from 36 days in Alabama and 40 in Wyoming to 120 in California, the most common limit is 60 days or thereabouts, which is the rule in some 18 states In 16 other states there is no absolute limit, but after a certain period members receive no pay, or their compensation is at a reduced daily rate [17] In general, such restrictions arise from a desire to compel legislators to perform their work with dispatch, and from a hope, too, of reducing the quantity of poor legislation, and of saving the state from the evils of over legislation generally Extended experience, however, has proved them disadvantageous Indeed, anything approaching a 60 day limit upon sessions, is—in these times of multiplying and intricate public questions—quite indefensible

2 Legislative procedure

Constitutional limitations relating to legislative procedure and to the form in which bills must be passed are designed to guard against surprise and trickery, to insure reasonable deliberation and publicity, and to promote responsibility Among restrictions found are clauses requiring that (1) all bills and their amendments be printed a certain number of days before final action is taken, although very often the rule is not observed, (2) every bill be read in full in each house on three different days, although where all bills have to be printed this serves no useful purpose, consumes much time, and in practice is commonly disregarded, (3) a yea and nay vote be taken on the passage of all measures, a rule also frequently ignored,[18] (4) no act embrace more than one subject to be indicated clearly in the title, and (5) statutes be not amended or revived by cross reference merely, but with all portions amended or revived included in full All of these and many similar restrictions, while of good intent, occasionally operate as undesirable impediments, while nevertheless overlooking them sometimes jeopardizes the most carefully planned legislation Not without reason has lawmaking been termed a hazardous occupation

3 Special legislation

Another group of restrictions has to do with "class legislation" and with local, special, or private laws, *i e* laws applying to, or for the benefit of, some particular person, corporation, or locality, or which at any rate are not of general and uniform application throughout the state, or which do not apply to all persons or corporations included in some authorized class As a result of favoritism, corruption, waste of legislative time, and other abuses arising from this source, most constitutions (with exceptions chiefly in New England and the South) now contain provisions designed to prevent such legislation altogether, or at least to restrict the number and variety of special or local laws that may be enacted

still in most states is inadequate

[18] To save much time otherwise consumed in roll calls for yea and nay votes 21 states have installed a system of electrical voting in one house or both.

*Remedies*

The most common ways of dealing with the problem are (1) to prohibit special, local, or private laws on any matter and in all situations which can be covered by a general law, and (2) to enumerate in the constitution matters which may not be dealt with in special or local laws, *e g* , in the constitution of Illinois a list of 23 and in that of Indiana 17 Thus we find legislatures expressly forbidden to pass special laws granting divorces, locating or changing county seats, regulating county and township affairs, granting or amending city charters, and conferring on any corporation, association, or individual any special or exclusive privilege, immunity, or franchise In many instances, such restrictions have had a salutary effect Much special legislation nevertheless continues to be enacted (especially in some Southern states), for pressures exerted by localities and interests often prove irresistible, and ingenious ways of evading the supposed restraints have been found

*4 Finance legislation*

*(a) Appropriations*

Usually the appropriating power is curbed by provisions limiting the period for which appropriations may be made, forbidding appropriations to private or sectarian schools or to religious establishments, and banning extra compensation for any public officer, agent, or contractor or payment of any claim against the state not expressly authorized by law All but three constitutions (those of Connecticut, New Hampshire, and Vermont) also prohibit the loan or pledge of state credit to private enterprises or to local governments, or to both, and in almost every instance the state is restrained from subscribing to the stock of private corporations or assuming liabilities of individuals, associations, or corporations

*(b) Taxation*

In the field of taxation there likewise are restrictions, not only on what may be taxed but on methods and rates Originally, these amounted to little more than a requirement that the general property tax be levied at a uniform rate based on valuation, and such a requirement still is often encountered Shortcomings of this tax have led in many states, however, to constitutional authorization of the legislature to classify property within prescribed limits and to tax different classes at different rates, although always uniformly within a class Even with such latitude, legislatures sometimes find their hands unduly tied, in Illinois, for example, it is constitutionally impossible to introduce a graduated income tax, because the courts have held income to be property, which may indeed be taxed, but only at a uniform rate regardless of the size of the income

*(c) Borrowing*

Finally, restrictions on borrowing—found in some form in the constitution of almost every state—fall into two main categories (1) those which (in 18 states) forbid borrowing at all except to refund existing debt, suppress insurrection, or repel invasion, with no other incurment of state indebtedness possible except by constitutional amendment, and (2) those (in 17 states) which specify that, with minor exceptions, no loan may be contracted by the legislature without express approval by the electorate Only the remaining 13 states are virtually without limitations on purpose, method, or amount In more than half of the states, county, city, and other local governments are, on their part, subject to constitutional debt limitations, with the legislature of course incapable of extending borrowing powers so fixed

## THE STATUTORY INITIATIVE AND REFERENDUM

Two guns behind the door

One other form of constitutional restriction calls for somewhat fuller attention, i e, provisions under which legislative functions are to some extent taken out of the hands of the legislature and vested directly in the people Two devices (usually but not invariably associated) are employed for this purpose—(1) the referendum, by which the voters pass final judgment on measures enacted by the legislature, and (2) the initiative, by which they originate and bring to decision measures which the legislature appears unwilling or unable to enact Both, of course, are expressions of a lack of full confidence in legislative bodies, both are designed, not for purposes of legislation generally, but as guns behind the door," to be used when the legislature fails to satisfy, one is designed to correct sins of commission, the other of omission

South Dakota, in 1898, became the first member of the Union to adopt the initiative and referendum for legislation on the state level, and since that time 18 others have taken a similar step, the last to do so being Massachusetts in 1918 In addition, Maryland and New Mexico have the referendum only, so that today (1951) the system (either referendum only or both) is in operation in a total of 21 states—all but five west of the Mississippi Moreover, all but five states now authorize use of one or both devices in specified classes of cities, and, like the recall, both have become familiar features of mayor council and council-manager governments and almost standard under the commission plan

Forms of the referendum

Initiative and referendum arrangements vary considerably, yet their essentials are not difficult to discern In the first place, referenda on legislation may be either optional or mandatory An optional referendum takes place when the legislature, desiring an expression of popular sentiment upon an act that it has passed, specifies that the measure shall not go into effect until it shall have been approved by the voters at an election, or the legislature may leave districts or counties to determine, each for itself, whether a certain law shall apply to them In this mild form, referenda may, of course, occur anywhere The referendum here in mind, however, is rather of the mandatory type, and independent of the legislature Where it prevails, provision usually is made for suspending all general legislative enactments (except of an emergency character) for a given period, commonly 90 days, in order to give the people of the state an opportunity to pass judgment on the work of their lawmakers If during the interval a prescribed number or percentage of the voters (most often five per cent) conclude that a given measure is undesirable, they may, by filing a petition, prevent it from taking effect until it has been submitted at the polls and approved by some specified number or percentage of the electorate

Procedure under the initiative

The initiative, where prevailing, may be invoked whenever any sizable quota of people believe that the legislature has failed to enact necessary or desirable laws A voter or group of voters may, with or without the assistance of

lawyers, draw up a bill designed to meet an alleged need [19] This done, the next step is to obtain the signature of a specified proportion of the voters [20] to a petition requesting that the bill be enacted into law The petition is filed with the secretary of state or other proper authority, and then either of two courses is taken, according as the law of the state specifies If the direct form of initiative is authorized, the measure is submitted to the people at the next regular election or at a special election, with the popular verdict final and the legislature completely by passed If, on the other hand, the 'indirect" form prevails, the proposal is presented to the legislature at its next session, and if that body acts upon it favorably, it becomes law without any popular vote If, however, the legislature fails to act favorably, the measure is referred to the people and, if approved by the required majority, becomes law by their decision In most states, the legislature is not permitted to amend any bill originating under the popular initiative, but in some it may submit a different measure as an alternative, and the governor may in no case veto a measure enacted by initiative and referendum

Frequency of use

As would be expected, both the initiative and the referendum are used far more freely in some direct-legislation states than in others, with the maximum reached in the Pacific Coast states, where one finds that between 1912 and 1942 California voters were confronted at the polls with no fewer than 439 state wide and local propositions—certainly more than they could approach with full intelligence In other parts of the country, the devices are employed more sparingly For example over a period of 30 years (1910 39) only 84 propositions (including constitutional amendments) were submitted in Michigan—an average of but three per election and in no instance more than eight

Arguments for direct legislation

The arguments for and against the initiative and referendum have been set forth fully in many places In summary, the principal advantages alleged are

1 The system gives the electorate both an affirmative and a negative check upon the legislature the need for which long has been felt in many states, especially in those where political machines or special interests have dominated

2 It tends to stimulate popular interest in the legislative process

3 With the voters enjoying the last word on what shall be law, various inherently undesirable constitutional restrictions on legislatures may safely be relaxed or repealed, and constitutions themselves proportionally shortened and simplified

Objections to it

Of numerous objections advanced, the most common are

1 The average citizen is incapable of voting intelligently upon the frequently

3 By fail ng actually to arouse the lively public interest presupposed, the devices facil tate the enactment of laws by mere minorit es

4 The electorate frequently is put to the needless trouble and expense of passing upon unimportant quest ons forced upon it by small but persistent groups

5 Efforts to obta n s gnatures to initiat ve and referendum petitions sometimes are attended by irregularities and fraud

6 The system tends to impair the qual ty of legislatures by weaken ng ind vidual sense of responsibil ty for what is enacted or fails of enactment s nce with the initiative and referendum operating the electorate always can correct any m s interpretat on of ts w ll

7 The burdensome and confus ng tasks already imposed upon the voters are

ignoring the proposals when they go to the polls

8 The scheme may be misused by a m nority element in the legislature to upset laws duly enacted by the majority as happened in Missouri in 1921 22

**A useful device but not a panacea** Some of these shortcomings in so far as they are real might be overcome by improving different aspects of initiative and referendum procedure or by withdrawing certain subjects from the operation of the two devices altogether as in Massachusetts It must be remembered that the system of direct legisla tion as now employed in connection with state lawmaking is designed pri marily to counterbalance the influence of bosses machines and special interests such as have dominated many a state legislature at one time or another and often for long periods As a remedy for legislative abuses it is not infallible any more than is the Australian ballot or the direct primary Nevertheless to many people it seems the best available expedient for vetoing or supplementing the acts of a legislature which proves to be not a representa tive but a misrepresentative lawmaking body and the National Municipal League s committee on state government gives it a prominent place in its model constitut on

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# CHAPTER 37

## The Legislature in Action

In general, a legislature is free to organize in whatever manner it chooses and to carry on its work under rules of its own making. Naturally, there is variation from state to state, yet organization and procedure are everywhere much the same, partly because of copying by one legislature from another, but chiefly because of following the example of Congress.

### OFFICERS AND COMMITTEES

Officers

In the lower house, the presiding officer always is a speaker, nominally chosen by the house itself, but actually pre-selected by the majority caucus; in the senate (except in Massachusetts), the lieutenant governor of the state presides where there is one, and in the 11 states without such an official, a president elected by the membership, again with caucus pre-selection. Presiding officers perform substantially the same functions as the speaker and vice president in Congress, and other legislative members enjoy about the same privileges and immunities as congressmen. Each house also chooses a clerk, a chaplain, a sergeant at arms, and other officers and attendants, and is required to keep and publish a record or journal of its proceedings.

Committees

1 Kinds

Like most numerous bodies, state legislatures make extensive use of committees, and three or four different varieties are found. Special or select committees are appointed for specific tasks and discharged when their assignments have been carried out. Recess, or *interim*, committees work during legislative recesses or between sessions, collecting information, conducting investigations, and preparing bills. Most numerous and important, however, are standing committees, set up for the duration of the house to which they belong, and charged with considering and reporting on all bills referred to them. In 44 legislatures, each house (and in Nebraska the single house) has its own full set of such commitees, covering all of the principal fields of state lawmaking—like finance, agriculture, and education, and in general they work very much as do standing committees in Congress, with majority members dominating, public hearings held, and bills either reported favorably or (in many states) pigeonholed and killed. In Massachusetts, Connecticut and Maine, however, proposed legislation is handled, not by distinct committees in the separate houses, but by joint committees, made up of members drawn

from both branches, and because of averting the duplication and delay more or less inevitable when the same measures must be considered by two committees acting independently, as well as because of reducing the tendency to shift responsibility from one house to the other, this plan has decided advantages [1]

2 Appointment

Some standing legislative committees are, of course, considerably more important than others, and the power to assign committee members naturally is significant, both for the rôle that individual legislators will play and for the fate of the bills to be handled Appointment to senate committees is made by the senate as a whole in five states, by a committee on committees in nine, and elsewhere by the presiding officer In the lower house, the power invariably is exercised by the speaker (as it once was by the speaker of the national House of Representatives) In both branches, the seniority principle operates substantially as in Congress, in both, also the majority party has more places on each committee than does the minority with of course the chairmanship in addition

3 Defects Excessive number

In most states, the number of standing committees is far too large, having as a rule been determined more by personal and political considerations than by requirements of good procedure Senate committees vary from fewer than 20 in 10 states to more than 40 in five states, North Carolina (with 52) having the largest quota House committees number fewer than 20 in only six states, and more than 50 in 6, Kentucky and Michigan leading with 71 and 69 respectively [2] Such multiplicity not only loads members with more committee assignments than they can find time for, but results in reference to different committees of interrelated matters which might better be handled by a single one In most legislatures, business could be transacted more speedily and efficiently if not to exceed 15 joint committees on the Massachusetts model, were substituted for the present cumbersome duplicating plan If, however, this is not feasible, there should at least be a uniform committee organization in the two houses, coordinated with the administrative organization of the state in order to bring the legislative and executive branches into closer relationship

Excessive size

Committees often are so large as not only to multiply a member's committee obligations unduly, but also to be unwieldy, with the result of throwing an excess of power into the hands of the chairman or of subcommittees In recent years, the largest have been found in the lower house in Georgia (75 members), Illinois (58), Iowa (54), and Pennsylvania (52), and in the Illinois senate (51)—although more typical numbers (even in the states named) now are between 20 and 40

*Other faults*

Another serious shortcoming in most states is the secrecy—at any rate lack of publicity—and the irresponsibility surrounding committee sessions Few states require committees to publish notices of the times and places of their meetings, or to maintain public calendars of committee meetings and hearings, or to keep and publish minutes of proceedings, or to open sessions

[1] Such joint committees have been employed also although on a far more limited scale in Mississippi Missouri New Hampshire New Jersey North Dakota, Rhode Island, South Carolina Virginia and Wisconsin.

[2] Council of State Governments *The Book of the States 1950-51* (Chicago 1950), 115

to the public In the great majority of states, furthermore, the two houses have insufficient control over their committees, one of the results being the frequency with which committees indefinitely retain, and thus smother, measures referred to them—a situation at its worst in certain states where "graveyard" committees are deliberately maintained with a view to pigeonholing and killing measures that the legislative "machine" does not want to see passed In several states, committees are required to report out all measures referred to them, and in others there are procedures by which a reluctant committee can be forced to report Most of the number, however, need stiffer regulations at this point Another common defect is the unequal distribution of work among committees, some having little or nothing to do while perhaps only four or five carry the burden of handling the majority of bills There are phases, too, of the operation of the committee on rules, of the "steering" committee, and of conference committees which often enable these agencies to become autocratic and irresponsible masters of legislative proceedings, especially in the last crowded days of a session And finally, the committee system in many legislatures needs reorganization to bring about closer and more harmonious relations among all committees which in any way, directly or indirectly, have to do with financial legislation

## THE LEGISLATIVE PROCESS

Rules of procedure

For orderly transaction of business, each house of any state legislature must have an accepted set of rules, and each is free to frame, adopt, and amend its own rules except in so far as restricted by constitutional provisions bearing on the matter In building up their procedural systems, most of the older states largely took over the rules operating in Congress at the time of their admission, while newer states have been prone to adopt practically *en bloc* a set of rules operative in some near by state In either case, there has been a strong tendency for rules, once in effect, to be carried along from session to session, and from decade to decade, with little or no change however far they might fall short of serving the best interests of legislative work Legislators who would not hesitate a moment to propose drastic changes in statute laws, or in the organization of the administrative branches of the government, commonly display little or no originality, courage, intelligence, or perseverance in introducing and insisting upon changes in the rules governing their own methods of work Consequently, very few state legislatures operate under really modernized rules, and the results often are serious, especially in states where the duration of sessions is rigidly limited by the constitution

Stages in the handling of bills

Parliamentary rules, an English politician once remarked, are made to be broken In an American state legislature (as also in Congress), they may not literally be made to be broken, but one almost might say that they are made to be suspended, for suspensions are so numerous, and often so significant—with also plenty of instances in which, if no one objects, a rule is simply ignored—that if the rules as printed be taken naïvely as a guide to what

actually goes on in legislative halls, a very distorted picture will result

Viewed in the large, however, the usual steps in the enactment of a bill are substantially as follows

for the use of members, and by reference (in nearly all states by the presiding officer) to a committee

4 Consideration in committee followed by a favorable or unfavorable report to the house—many bills in most legislatures of course, being cut off here by failure of the committee to report

ndment

be by roll

ouse

9 Progression through the same series of steps in that branch

10 Appointment of conference committees to meet and adjust differences between the two houses

11 Adoption of the conference report in both houses

12 "Enrollment," i e writing or printing the bill in final form

13 Submission of the completed bill to the governor for his approval or veto

14 Return of the bill, if vetoed, to the house in which it originated [3]

15 Passage there by the requisite majority (usually two thirds)

16 Transmission to the other house where if the outcome is similarly favorable, the end of the long road is reached and the bill becomes law

Congestion of business at the close of a session

Almost everywhere—even when there is a limit of 60 days or some other brief period—a great deal of time is wasted in the early part of a session, or at best is consumed in organizing, making committee assignments, and gaining familiarity with the complicated rules, and all too frequently a legislature comes up to its final stages with comparatively little accomplished, and spends its last week or 10 days working overtime, often amid the most demoralizing confusion That such congestion may be sharply reduced is proved by the experience of Massachusetts, where rules have been devised for obtaining prompt and orderly consideration of measures, and where the joint committee system also has contributed greatly to speeding up proceedings

## LEGISLATIVE AIDS

Most legislators not experts

None of our state legislatures can by any stretch of the phrase be termed a body of experts on either the form or the substance of legislation Members come from all walks of life and ordinarily give only a few months once in two years to the business of lawmaking, as a rule, most of them have not even had previous legislative experience In point of fact, however, it is neither expected nor necessary that the average legislator qualify as an

[3] Unless with the session drawing to a close the governor chooses to kill the measure by pocket veto See p 614 below

expert, on the whole, it is just as well that he should not do so For the technical side of his work, *e g*, bill drafting, assistance almost always is provided, and for his primary task of impartially weighing and making up his mind on conflicting interests, proposals, and arguments, it is more essential that he be temperamentally fitted for taking broad views and reaching dispassionate decisions than that he be an authority on any particular field of legislative action On the substance, too, as well as the form of legislation, he can have help if he wants it

1 Legislative reference bureaus

As a rule, the source nearest to hand is a legislative reference bureau, operated in some states as a division of a central state library, in others independently and perhaps itself under the name of "library" Such an adjunct was first introduced in New York in 1890 and Wisconsin in 1901, and nowadays, under some form or name, is found in nearly every state Two main purposes are served (1) assembling, shelving or filing, and indexing for ready use the statutes of the various states, judicial decisions interpreting them, administrative reports, governors' messages, and a wealth of miscellaneous materials on all manner of subjects likely to come up during a session, and (2) providing assistance in drafting bills Any legislative member needing information normally can count on it being obtainable from the bureau's varied resources, and on assistance from trained staff members in locating it and determining its significance Although members commonly are not the authors of any large number of bills, they do originate some and nearly always they stand in need of expert aid in putting them into shape for enactment Occasionally a bill drafting bureau is maintained separately from the legislative reference bureau or library, but more often it is a division of that establishment, and in either event the member with an idea for a bill will, if he is prudent, turn to the bureau's experienced draftsmen to translate his proposal into the clear and concise legal phraseology supposed to characterize statutory enactments

2 Public hearings

Another channel for useful information is public committee hearings at which arguments for and against a bill are presented by private individuals, either in person or by attorney, and by private and public corporations through their officers or other representatives Usually any person so desiring will on request, be given a chance to be heard, and while commonly much that is said is strongly *ex parte,* opportunity to hear opposing views and arguments from outside the legislature—and not merely from lobbyists—frequently is helpful Unfortunately, members not on the given committee are so occupied with other duties that they seldom find time to attend such hearings, and therefore often do not directly receive much enlightenment

3 Reports of *interim* committees

With increasing frequency, special *interim* or recess, committees—composed of legislative members only, or with administrative officials or citizen representatives added—are set up to investigate difficult problems and report recommendations at a later session, during 1947 sessions alone, 264 such study groups were authorized in 33 states With expert research staffs often employed, extensive reports dealing with taxation, administrative reorganization, revision of election laws, workmen's compensation and other labor

laws, highways, labor, health, insurance laws civil service retirement and pension funds *(to mention only a few subjects) have in recent years proved* important aids to intelligent legislative action in many a state

**4 Legislative executive cooperation**

The great bulk of state legislation has to do with work carried on by the state and local governments and in the last analysis most of the information which members need in order to act intelligently on matters relating to such work must come from the officers boards, and commissions actually performing it On the other hand the administrative authorities depend upon the legislature for power and for funds And this interdependence points forcefully to not only the desirability but indeed the necessity of close cooperation between the legislative and administrative branches if either is to perform its functions effectively Unfortunately, whatever connection and cooperation exist today have usually to be achieved in more or less roundabout ways—the obvious mode of correction being to give the governor and other executive officers the privilege of the floor in both houses to explain and defend their requests for appropriations or for other legislation [4]

## LEGISLATIVE LEADERSHIP

**From within**

Large and unwieldy as they commonly are state legislatures urgently need leadership, which may come either from within or from without With the two

however, often divide along party lines less sharply than does Congress,[5] with party organization weaker, caucuses rarely are very vigorous or effective in determining legislative policy, and steering committees and floor leaders may or may not actually lead, depending upon circumstances Under a bicameral system, party leadership can mean little, too, if, as often happens, the two houses are controlled by different parties On occasion (especially in the last crowded days of a session), the steering committee, or even the rules committee, may hold the whip hand in driving its own chamber to action But if any broader, over-all leadership comes from within the legislature at all, it ordinarily must originate mainly with some small informal group of older and seasoned members, including usually the speaker of the house, the *president or president pro tempore of the senate, rules-committee members,* and chairmen of other important committees

**From without**

In default of, or in addition to, *leadership within its own ranks*, a legislature may, of course, be led from the outside More than once, this has meant control of a "boss-ridden" or "machine dominated" legislature by some irresponsible party chief holding no state office and perhaps not even any formal

... New York in 1927 the governor has a right

party post[6] It may, however, mean leadership by a vigorous and favorably situated governor, analogous to that supplied by some presidents at Washington, and although that official's subordination to the legislative branch under earlier state constitutions once commonly made such leadership highly exceptional, if not impossible, later tendencies toward increased executive participation in legislation have been reflected in rather effective leadership by a number of strong governors in New York and other states

Legislative councils

One thing preeminently needed is a larger amount of intelligent planning, not only during a session but before a session begins, and to furnish such planning, the legislatures of 26 states, starting with Kansas in 1933, have adopted and now employ a legislative council (or comparable agency), consisting usually of from five to 10 senators and from 10 to 15 members of the lower house Canvassing the legislative needs of the state, formulating programs, preparing and recommending bills, employing experts for special studies and making their findings available, such a joint "super committee has in many states quite transformed the initial stages of the legislative process, supplying leadership urgently needed but seldom forthcoming where the old haphazard sources are still relied upon The "model state constitution" gives the legislative council a prominent place

## SOME FURTHER LEGISLATIVE PROBLEMS

1 Lobbying

The general public commonly can be charged with too great indifference toward legislative activities Special interests, however, with selfish ends to serve, and, on the other hand, well meaning and public-spirited supporters of "causes," show no lack of interest, and usually a principal way in which their concern finds expression is through lobbying Often they, or their representatives, descend upon the state capital like a cloud of locusts and become the most powerful of all influences shaping the legislation of a session As observed earlier in connection with Congress, the resulting problem is one of the most troublesome in the entire field of legislation On the one hand, farmers, manufacturers, railroads, professional organizations, and all other interest groups are clearly entitled to carry their points of view to the state capital and make them heard, not only on such occasions as committee hearings, but in private contacts with legislative members, and a lobbyist's activities are quite capable of being as legitimate and socially useful as those of counsel in a court of law On the other hand, legislators often are unduly hounded and pressured, and dishonesty and corruption sometimes mark the lobbyist's trail Believing the best, and perhaps only, corrective to be publicity, the legislatures of approximately three fourths of the states have enacted measures introducing one or more of three principal forms of regulation (1) requiring all lobbyists, their employers, or both, to register with the secretary of state or other specified state agency, (2) requiring all to file at the close of every legislative session authenticated accounts of their expenditures on lobbying activities, and (3)

[6] A classic picture in fiction of a boss-controlled legislature (in New Hampshire) will be found in Winston Churchill's *Coniston* The Pennsylvania legislature of the time of Quay and during the early years of the Penrose domination would have furnished similar material

forbidding lobbyists to be employed under agreements making their compensation dependent on the success of their efforts. In some states, *e.g.* New York, Massachusetts, and Wisconsin, such controls have had at least limited effectiveness, in others, experience has hardly more than underscored the difficulties involved.

**2. Uniform state laws**

With 48 state legislatures functioning independently, it is not surprising that many subjects or problems are dealt with in quite different ways. And for the most part, such diversity is not a bad thing. People in different parts of the country have a right to legislation reflecting their own interests and ideas, and the freedom with which a state, meeting new problems, can blaze its way toward its own solutions is one of the virtues of our federal system. There are, however, limits. For subjects exist—many of them—on which uniformity of regulation the country over is desirable, yet with no constitutional possibility, or at any rate no likelihood of action by the federal government, and in such situations the only available solution is concurrent legislation by all, or substantially all, of the states. Many examples can be found in the broad field of commercial relationships, *e.g.* the making and enforcement of business and insurance contracts, where lack of uniformity would lead—indeed in repeated instances has led—to confusion, if not chaos. The baffling status of individuals and of property as affected by divorces and subsequent remarriages offers another illustration. When the same act is treated as a felony in one state, as a misdemeanor in another, and is not punishable at all in still another, some getting together on definition of crimes would not be amiss. Highly advantageous, too, would be uniformity in motor vehicle laws, in laws governing admissions to the bar and licensing of physicians, and in laws of other sorts that will readily suggest themselves to the reader.

In some fields, the federal aid system is promoting uniformity, and interstate compacts offer limited help. The principal agency working toward the goal directly is, however, a voluntary, unpaid National Conference of Commissioners on Uniform State Laws, dating from 1892, composed of usually three representatives (lawyers, judges, and law teachers) of each state, and concerning itself with drafting desirable uniform laws and recommending them to the states. Approximately 60 carefully considered statutes are now being offered, and while only two have been adopted by the legislatures of all states, several others have been approved in as many as 35 or 40. Of course, even an identical statute always will be subject to varying administrative and judicial interpretations in different states. In many fields, however, statutory uniformity would nevertheless yield large gains.

**3. General reorganization**

In earlier chapters mention has been made of a renovation of congressional organization achieved under legislation of 1946. Nearly all of our state legislatures stand urgently in need of an overhauling at least as thorough, indeed, it should extend—as the federal reform also should have done—to not only organization but procedure as well. The closest approach to something of the kind, has, of course, been in Nebraska, where reconstruction of the legislature on a unicameral basis a decade and a half ago forced something like

a fresh start in legislative matters But the fairly long list of states that have drastically and usefully overhauled their systems of administration is paralleled by no such list of states renovating their legislatures Such improvements as have been made here and there have been merely piecemeal Of many legislatures, one can say only that they are satisfied with themselves, and of many people, that they take their legislature for granted and show no deep concern about improving it

Fortunately, this does not mean that the matter is wholly going by default Forward looking legislators in many states are discussing various angles of it, within a decade joint legislative committees have studied phases of it in Massachusetts Connecticut, New York, Michigan, California, and other states elsewhere studies have been undertaken and reports made by private agencies, a Committee on Legislative Processes and Procedures, created by the Council of State Governments in 1945 and consisting of nine representative legislative members and state officials from over the country reported a well considered 12-point program, and actual improvements, even though scattered and limited, have been recorded—legislators' pay increased, terms lengthened, committees reduced, and above all, legislative councils established or revitalized Traditional inertia continues difficult to overcome But changes gradually are taking place and changes on any scale hardly can fail to be for the better

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# CHAPTER 38

## The Executive Branch—The Governor

Under the principle of separation of powers, national and state governments alike have an executive branch, charged with carrying into effect public policies enacted into law and with performing other duties imposed by the constitution and statutes Whereas, however, on the national level executive power is gathered in the hands of a single official, the president, as *the* executive, in the states there is no such concentration, but instead a dispersion among half a dozen or more practically independent "constitutional officers" —governor, lieutenant-governor, secretary of state, auditor or comptroller, treasurer, attorney-general, superintendent of public instruction—with the governor tending in some states to become an effective over all director, but in most of the number still lacking anything approaching the integrated control associated with the president As *chief* (if not *the*) executive, however, the governor must be given main attention here

### THE GOVERNOR—ELECTION AND TENURE

**Nomination and election**

In only two of the colonies (Connecticut and Rhode Island) was the governor chosen by the people, and in all of the original 13 states except Massachusetts and New York, he was elected by the legislature The plan of popular election, however, gradually won its way, and nowadays it prevails in every state [1] Candidates are nominated on a party basis usually in state-wide primaries, but in New York, Connecticut, and a few other states by state-wide conventions composed of delegates from counties or legislative districts The office commands prestige, sometimes it leads to a senatorship or even the presidency, and competition for it is keen

**Qualifications, salary, and term**

All state constitutions require the governor to have certain qualifications He must in any case be a citizen of the United States, and in all but a few states he must be at least 30 years of age (the actual average is about 51) Usually he must have resided in the state for a period of not less than five years His compensation is either specified in the constitution or left to the discretion of the legislature, the present range being from $4,500 a year in Maryland to $25,000 in New York and California, with an average of about $10,000 In 27 states, the term is fixed in the constitution at four years, in

[1] With some qualification in Vermont and Mississippi See p 572 above

the remaining 21, at two years—the tendency being to shift from two years to four, as in New York in 1937 and New Jersey (from three years) in 1947 In anything less than four years, it is increasingly recognized, a chief executive hardly can attain his maximum of usefulness to the state As a rule, the governor is eligible for immediate reelection, and for reelection any number of times Here and there, however, there has been fear lest unrestricted tenure open a way for dangerous entrenchment in power, and in Pennsylvania, Indiana, and about a dozen other states (including about half of those having a four year term), a governor is debarred from serving two consecutive terms, and in three others more than two such terms [2]

Except in Oregon, the governor and other principal state officers may be removed by impeachment The power, however, seldom is exercised, and in point of fact only 13 governors ever have been impeached Five impeachments occurred in the South during the Reconstruction period one governor was removed from office, one resigned to avoid removal, and in the other instances the charges were dropped In the North, two governors were impeached during the same period, one being acquitted and the other removed from office for embezzlement of state funds More recent cases include the impeachment of Governor Sulzer of New York in 1913, Governor Ferguson of Texas in 1917, and Governors Walton and Johnson of Oklahoma in 1923 and 1929, respectively—all of whom were removed from office In 1929, Governor Huey Long of Louisiana was impeached Before the trial progressed far, however, the case was discontinued In 1935, Governor Moodie of North Dakota was impeached But before the trial began, the state supreme court ruled that he was ineligible for the governorship because of insufficient residence in the state, and as a result the lieutenant governor assumed the office and impeachment proceedings were terminated In a dozen states, an alternative method of removing state officers is supplied by the popular recall To the present time (1951), however, only one governor—Frazier of North Dakota, in 1921—has been ousted in this manner

In event of the governor's death, resignation, removal, or extended absence, the lieutenant governor, if there be one, succeeds to the office—except, of course, that when the governor has been recalled by popular vote, his successor becomes the rival candidate who polled the highest vote at the recall election In eight of the 11 states having no lieutenant-governor, the president of the senate is the designated successor, and in the remaining three the secretary of state If in any state it proves necessary to go beyond the officials named, the speaker of the house of representatives commonly stands next in line

## THE GOVERNOR AS CHIEF EXECUTIVE

Like the president of the United States, the governor is first of all an executive Whereas, however, the president has all executive power that can legitimately be read into the term "executive," the governor has little or none

[2] For a table showing term and salary of all state governors in 1949 see Council of State Governments *The Book of the States 1948-49* Supp II (Chicago 1949) 1

except as expressly conferred by the constitution or by statute, and with this naturally varying from state to state, any single picture of the governor as an executive becomes impossible On the one hand, upwards of half of the states cling to the weak form of governorship inherited from early days and holding the field until within the past 40 years On the other hand, a substantial and slowly increasing number have so transformed their governmental arrangements by constitutional amendment or statute, or both, that quite a different type of "strong" governor has emerged

1 The 'weak executive'

In the first group of states, the governor's weakness arises fundamentally from the circumstance that, instead of being organized symmetrically in a series of coordinate departments with the chief executive at the apex, the executive branch as a whole is a loose rambling structure in which that official enjoys at best only a certain ill defined primacy Chosen independently by the people for fixed terms, and occupying separate islands of power, the other constitutional officers are under no effective control from their nominal chief and may cause him plenty of grief, especially when of a different party, and equally exempt are likely to be the many miscellaneous officials, and especially the boards, commissions, and similar agencies by which the administrative structure of any state is rounded out

(a) Appointment

Particularly serious, under such a set-up, *is the constricted power of appointment and removal* On the one hand, practically all state constitutions make it the governor's duty ' to see that the laws are faithfully executed " But on the other, for carrying out this mandate he (in "weak executive" states) *commonly is left largely dependent upon officials—from the "constitutional'* officers mentioned down through prosecuting attorneys, sheriffs, constables, and police officers—whom he does not appoint, often cannot remove, and to only a limited extent can control By constitutional provision or by statute, he *does, of course, appoint some* officials, especially members of statutory boards and commissions But in the first place, the number is limited not only by frequent constitutional restriction to officials whose appointment or election is not otherwise provided for, but also by common unwillingness of the courts to recognize the power of appointment (or removal) as necessarily or exclusively executive or as belonging to the governor simply because of being chief executive And in the second place, even where he can appoint, the "weak" governor seldom has a free hand, because of being obligated to submit his nominations to an executive council (in the three New England states in which such a body exists), or oftener to the state senate, for confirmation

(b) Direction and removal

Responsibility for seeing that the laws are faithfully executed would seem to presuppose broad freedom for the governor to supervise and direct the work of administration in all of its phases In most states, however, there are limitations at this point also, arising first from judicial constructions limiting powers of direction to those expressly conferred, second, from excessive constitutional regulation of the methods by which administrative work is to be carried on, and finally from restrictions upon *the governor's power to suspend or remove* officials Principal elective officials can, as a rule, be removed only by the

cumbersome process of impeachment, and even where the governor is authorized to remove either these or appointive officials, such action in several states can be taken only with consent of the executive council or the senate—in New York by a two-thirds vote of the latter On the national level, the chief executive's responsibility for enforcing the laws is backed by practically full and independent authority to oust officials found insubordinate or otherwise delinquent, on the state level, however, such authority usually does not exist Very few people understand the limitations under which most governors usually work

There are, however, states in which the governor as chief executive is like the president, in a far stronger position What usually has happened in such situations is that, with varying degrees of thoroughness, dispersed and largely independent offices and agencies (sometimes including even some of the constitutional offices) have been gathered into a series of 10, a dozen or more essentially coordinate departments, each with an integrated structure and usually a single head, and all placed under immediate supervision of the governor Where this has taken place, the number of elective state officials has been sharply reduced, with the governor's appointing power correspondingly broadened, and with confirmation by council or senate sometimes partially or wholly abolished No other state has yet gone as far as New Jersey in adopting, in her new constitution of 1947, a consolidation leaving the governor the sole surviving elective state executive or administrative official, and vesting the appointment of all others (all state judges likewise) in the governor and senate [3] But the difference between the New Jersey system and that in some other forward looking states is only one of degree Along with more appointing power invariably goes also, where the consolidated plan prevails, broader powers of supervision and control over administration, backed by more leeway in making removals Even under the decidedly advanced New Jersey plan, authority of the legislature to place limitations on the removal power is preserved Yet in that state and a few others, removals are in practice made by the governor independently, subject only to the right of persons affected to be heard and to appeal to the courts In states of this consolidated type, too, the power to prepare the budget is commonly bestowed upon the governor if he has not previously possessed it

The upshot is that in such states the governor, far from being a mere titular head of the executive branch as in so many others, becomes the actual director and manager of the state s affairs, with opportunity to formulate the policy of his "administration," including its financing, and power to require all of his subordinates, starting with the heads of departments, to carry it out Advantages flowing from such unity of personnel, operations, and responsibility, moreover, are so immense and so obvious that one perhaps may safely predict a slow but steady change over by the great majority of states to patterns of similar promise

[3] If boards and commissions choose to designate single officials to enforce their findings and rules selection of them is subject to the governor s approval and he also can remove them after notice and hearing

## THE GOVERNOR AND LEGISLATION

Although the legislature is a state's principal organ for enacting laws, the function is everywhere shared by quasi legislative boards or commissions, and still more importantly by the governor. Indeed, as a factor in legislation the governor, whatever his situation as an executive, is hardly second to the legislature itself, for although, as in the case of the president, his legally recognized legislative authority is mainly negative (e.g. the veto), he often is able to exert positive influence as well in determining both the form and the substance of laws passed. Outside of states that have adopted the consolidated type of executive and administrative organization, legislation is, in fact, the chief point at which his power is at present growing.

**1. Special sessions of the legislature**

Control over legislation may be regarded as starting with the governor's right in every state to call special sessions of the legislature and to indicate the measures that he wants passed or at least the matters that he wants considered. In 21 states, indeed, the legislature, when convened in special session, may consider only such subjects as have been indicated in the governor's call, and this not only practically compels such subjects to be taken up, but precludes consideration of anything not on the executive's list. Some of these states, nevertheless, permit the governor, during the course of a special session, to add topics not specified in the original call.

**2. Messages**

Practically every state constitution requires the governor to inform the legislature at the opening of each session, or 'from time to time,' concerning the condition of the state's affairs and to submit recommendations for action, and the usual practice is to transmit a general message, orally or in writing whenever a new session begins, together with occasional special messages including, in 40 states having an executive budget system, a 'budget message.' Like similar communications of the president to Congress, messages not infrequently are addressed over the heads of the legislators to the people at large. Sometimes, too, they are accompanied by bills incorporating recommendations made. Whether such recommendations and bills receive favorable consideration depends largely upon the governor's tact and persuasiveness, upon the amount of popular support back of his proposals, and, not infrequently, upon the vigor with which he wields the veto and uses his patronage as clubs for bringing reluctant members into line. Naturally, his power will go farther, too, if his own party has a harmonious majority in the two houses. But in any event, by highlighting recommendations embodying policies which his party has endorsed in its platform, or policies for which he is individually willing to assume responsibility, the governor may make himself a factor of prime importance in shaping legislation.

**3. Budget making**

The rapid spread of state budgetary reform has considerably increased the governor's legislative influence.[4] Indeed, a large majority of the states which have adopted improved budgetary methods have recognized the high desirability of assigning him the leading rôle in preparing the state budget

[4] On budgetary reform see pp. 645-647 below.

No other official or group of officials can perform the task so satisfactorily, none is in a position to be so familiar with the needs of the various administrative branches and state institutions And it is the governor primarily who will be held responsible for economical and efficient government

The desirability of giving the governor some official share in translating the public will into law is further recognized practically everywhere by granting him the veto power Originally, the states bestowed this power sparingly, or not at all, of the earliest state constitutions, only those of Massachusetts, New York and South Carolina made provision for it Nowadays, however, it is found in every state except North Carolina, and when invoked it enables the governor to exert a tangible influence in legislation equivalent to not less than that of one half of the legislature, with the single limitation that it can be employed only in the negative

Before any bill passed by the legislature becomes law, it must (except in North Carolina) be submitted to the governor, and if he vetoes it, it fails unless the legislature passes it a second time by the requisite majorities The time allowed the governor for consideration of bills varies from state to state During the legislative session, he has from three to 15 days in different states, with five most common and if he fails either to approve or veto a bill within this time, it automatically becomes law just as if approved If, the legislature adjourns within the period, the bill, in some states, becomes law unless formally vetoed, but in others becomes such only if formally approved—which affords the governor a chance to employ a pocket veto," or veto by inaction, similar to that possessed by the president of the United States In her new constitution of 1947, New Jersey, however, while greatly strengthening the governor on the executive side, has put an end to such pocketing by providing that at the end of 40 days after an adjournment the legislature shall reassemble to take final action on all measures vetoed (by any method) during the interim, repassing them or permitting the veto to stand, as the case may be

Of more importance is the length of time allowed for the consideration of bills after the legislature adjourns, for almost invariably the bulk of legislation is passed shortly before adjournment In 34 states, the governor is given a definite period following adjournment, ranging from three to 45 days, in which to approve or disapprove measures placed before him In 23 of these, bills become law unless he records his disapproval within the specified time In the others, including California and New York, no waiting bill becomes law unless positively approved within the period [5] In all of these states, the governor sits after the close of a legislative session practically as a third house, consulting experts, holding hearings, and trying to decide what to do with each of the measures piled high on his desk

The size of the vote required in the legislature to overcome a veto also varies In Connecticut, a mere majority of a quorum in each house suffices and in six other states a majority of the full membership is adequate, in five states, a three fifths vote is required, elsewhere, a two-thirds vote is necessary,

[5] For a tabulation of the governor's veto power in the 48 states see Council of State Governments *The Book of the States 1950-51* (Chicago 1950) 117

based, in 13 states, on the number present, and in the remaining 22, on the total membership The records, however, show, comparatively few vetoes overridden, in Pennsylvania, for example, only one veto has been overridden since the beginning of the present century

(c) Extent of the veto power—the item veto

The scope of the veto power likewise differs In eight states,[6] every bill on which the governor passes must be approved or rejected as a whole, even though some parts of it may be deemed good and others bad In the case of appropriation bills, this often has resulted in forcing the governor to accept an entire measure, including items unnecessarily large or for doubtful purposes, or else veto the entire bill and perhaps jeopardize the voting of necessary *funds* when needed In such a situation most governors have felt compelled to take the first alternative To enable the governor to restrain the common legislative tendency to wastefulness and to voting expenditures for purely local objects, 39 states have now given him the right to veto separate items in appropriation bills In Massachusetts, Pennsylvania, California, and a few other states, too, this has been construed to permit not only striking out separate items, but also reducing their amounts The latter interpretation, however, may work out badly, as it has done in Pennsylvania, where the legislature has been able at times to gratify local constituencies by voting appropriations far in excess of the estimated revenues of the state, and in so doing to unload on the governor the burden of whittling down the appropriations and of shouldering whatever local unpopularity may result Washington has gone so far as to permit vetoing any section or sections of *any* bill passing the legislature Everywhere else, however, measures other than appropriation bills must be approved or rejected in their entirety

(d) Effects

The extent to which the veto power is used depends upon the political and personal relations existing between the governor and the legislature, as well as upon the nature of the veto power itself in any particular state, vetoes naturally are most numerous in those states in which it is possible to disallow separate items in appropriation bills Moreover, the full significance of the veto power in the governor s hands is not measured simply by the large number of bills vetoed and the very small number passed a second time A mere hint from the governor s office that a veto may be expected if a certain bill passes often is sufficient to kill the bill, and frequently something more than a hint is forthcoming Indeed, the possibility of a veto often impels members of the legislature to ascertain what the governor s attitude is likely to be *before they even introduce a measure* Furthermore, in informal conferences with members of the legislature, or in more formal committee hearings, the governor may indicate amendments that will have to be made if a bill is to receive his approval Not infrequently, too, a veto message points out specific objections to certain parts of a bill, and a new measure is introduced and passed with the challenged features omitted or amended[7]

[6] Indiana Iowa Maine Nevada New Hampshire Rhode Island Tennessee and Vermont
[7] The "model state constitution proposed by the National Municipal League authorizes a majority in the legislature (the plan presupposes a single chamber) to submit to a referendum any bill vetoed by the governor and on question of repassage receiving a majority but not a two-thirds vote

Our constitutional principle of separation of powers has not prevented the public in recent decades from looking increasingly upon the governor as leader in legislation, or from holding him responsible at every session for having and putting through a legislative program, very much as the country holds the president responsible for getting legislation through Congress And while some incumbents are more earnest and adept in exerting such leadership than are others, by and large the governor has tended to become chief law-maker in nearly every state In playing his legislative rôle, a governor is, of course, handicapped by being unable to go into the assembly and senate and explain and defend his measures face to face But at least he has the means of influence available to the president in a similar situation—messages, con ferences, "lobbying" through trusted assistants, and the like And two or three over-all factors count heavily in his favor (1) Most legislators are elected, and most legislation is handled, on a party basis, as a rule, the governor is the majority party's recognized leader in the state, and in pressing for laws which the party has promised, he speaks, not simply as an individual who happens to be chief executive, but as party head and in the party's name (2) Assemblymen and senators have individual interests—appointments for constituents, appropriations for objects of concern, bills needing executive approval, and a governor would be more than human if, in furthering legislation which he has at heart, he did not capitalize on such interests (3) Ordi narily no other person in the state is as well known to the people, on no one else do they count so much for good laws as well as good administration, and with avenues like personal acquaintance, public appearances, legislative messages, the press, and radio, open for cultivating popular support, a governor of firm intent often can carry even a reluctant legislature with him toward a given legislative goal [8]

## GOVERNORS OF TODAY

The American governorship always has been an office of honor and invested with prestige It remains such today, and in addition has grown greatly in power and responsibility Demands made upon any incumbent in any state are heavy, and whoever seeks the post will do well to be fortified not only with capacity and experience, but with health, diligence, and endurance as well Over a quarter-century, the 48 states have had some 200 different governors, and it would be strange if studies of so many personalities did not bring to light variations of type ranging all the way from the blatant demagogue to the statesmanlike administrator and leader The average, however, has been at least respectable, perhaps something more Drawn in practically

[8] In addition to the executive and legislative functions outlined the governor has others which can only be mentioned here One is that of pardon and reprieve exercised in some [illegible] others with [illegible] *ex officio* [illegible] hief execu [illegible] with other [illegible] rnor's time [illegible] udying the state's big problems of legislation and administration

every instance from the substantial business and professional classes, governors quite predominantly are college-trained, farming, manufacturing, merchandising, banking, and journalism are represented, but almost half are lawyers, the great majority have had previous experience in public life—in other state or local office, in federal office, in the legislature, occasionally in Congress, and while after serving a term or two or three most of the number return to their regular business or profession, a substantial and of late increasing proportion remain in public life, receiving appointment to federal posts, winning election to Congress, and in no small number of instances becoming more or less likely contenders for the presidency itself

Influence of circumstances

How a governor will rank in the history of his state after his period of service is over, or among governors of his time throughout the country generally, will, of course, depend upon many circumstances and factors whether his is a "strong executive" state, whether he has the advantage of being able to work with a friendly legislature, whether his state offers a challenging opportunity to 'ring the bell' with a bold program of reforms, whether wartime or depression time emergency invites to conspicuous leadership Any governor, however, can, in almost any state and under almost any conditions, achieve local and even national distinction if possessed of the requisite vision, vigor, and skill, and the high proportion of gubernatorial administrations that come and go in a majority of our states without leaving much impress must be charged chiefly against politicians and people who, in choosing even the state officer usually engaging their liveliest interest, fail to raise their sights above the level of mediocrity

## OTHER EXECUTIVE OFFICERS

1 Lieutenant governor

A lieutenant-governor is provided for in 37 state constitutions [9] In general, his functions are (1) to succeed the governor in the event of the latter's death, disability, removal or protracted absence from the state, and (2) to preside over the senate (except in Massachusetts) with a casting vote in case of a tie (except in Michigan) In some states, he has a right to participate in senate debates to vote in committee of the whole and to serve as an *ex officio* member of the governor's council (if any) and of various boards and commissions On the whole, the office, when not useless is at least unimportant, and the 11 states without it seem to have experienced no inconvenience The 'model state constitution' simply omits it

2 Secretary of state

As keeper of the state archives and state seal, there is always a secretary of state (or of the 'commonwealth') who publishes and distributes the state session laws, countersigns proclamations and commissions, issues certificates of incorporation, receives election returns and performs other highly miscellaneous duties In three states he is chosen by the legislature, in seven appointed by the governor, and elsewhere elected by the people

3 Treasurer

The state treasurer is custodian of the revenues and trust funds of the state, which he pays out, on order of the auditor or comptroller, for purposes authorized by law Treasurers are chosen by the legislature in five states, appointed by the governor in New York and Virginia, and elsewhere elected by popular vote

[9] The states having no such office are Arizona Florida Maine Maryland New Hampshire, New Jersey Oregon Tennessee Utah West Virginia, and Wyoming

The auditor or comptroller (found in all but three states) is considerably more important than the treasurer, for he not only checks the accounts of all state officers charged with the collection or disbursement of state funds, but issues the warrants without which no money may be drawn from the public treasury. In Maine, New Jersey, Tennessee, and Virginia, he is chosen by the legislature, elsewhere, by the people

The attorney general—principal law officer of the state—prepares legal opinions for the governor and other state officials, appears in court to represent the state in litigation, and in about a fourth of the states exercises limited supervision over local prosecuting attorneys, although in some instances he has not proved a very influential factor in law enforcement In New Hampshire, New Jersey, Pennsylvania, and Wyoming, he is appointed by the governor, in Maine, he is chosen by the legislature and in Tennessee by the supreme court, elsewhere the people elect him

The superintendent, or commissioner, of public instruction has charge of the general educational interests of the state, and in this capacity supervises the administration of the school laws, apportions the school funds among cities, townships, or school districts, conducts investigations, and makes reports to the governor and legislature concerning the public school system Superintendents are elected by popular vote in 33 states, but appointed by the governor in seven, and by state boards of education in eight.

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and Alfred E Smith

# CHAPTER 39

# Administrative Organization and Problems

Outside of foreign relations and national defense, the activities of state and local governments reach almost everything of a public nature with which the average citizen is concerned. Many of these matters are touched or controlled by the federal government also. But in any case the states and their subdivisions have to do with them as well, and this means not only an *almost limitless field for regulative action by the legislature, but likewise* an extraordinary demand upon the agencies and processes of administration. In carrying out, in detail and day by day, the laws and other regulations which the legislature makes or authorizes, administrators must protect life and property, control commerce and business, foster agriculture, supervise labor relations, build and repair highways, regulate utilities, protect natural resources, provide for popular education, safeguard health, care for the needy, *maintain correctional institutions*, conduct elections, collect revenues, pay out money, and do a multitude of other things expected of the twentieth century state. The extent, too, to which a state government, directly or through local agencies, meets the purposes for which the people maintain it depends largely, if not primarily, upon the intelligence, energy, and efficiency with which the work of administration is performed. Administration, indeed, is the only part of government with which most people often, or ever, come into direct conscious contact—the part from which they largely derive their impressions of how well ordered and useful their government is.

## THE TENDENCY TO ADMINISTRATIVE EXPANSION

*Multiplying agencies*

In early days, when governmental functions were few, administration on the state level was a comparatively simple affair. The governor and four or five other principal officers, with small staffs of deputies or other assistants, met all needs at the state capital, and hardly any field forces were required. As, however, population grew and state activities multiplied, the situation changed. Not only did added duties fall to preexisting officials, but new officials—highway commissioners, superintendents of banking, directors of conservation, and the like—were introduced, and in addition many supervisory, regulatory, or administrative boards and commissions, sometimes by constitutional provision, more often by statute. After about 1900, indeed,

multiplication of boards and commissions became the outstanding feature of state government (with some parallel, of course, in the federal field), and although the pace eventually slackened, hardly a legislative session now terminates in any state without one or more new agencies authorized As a result, the administrative machinery of even the smallest and least populous states has become a labyrinth through which only an expert can readily find his way

Some reasons

Reasons for such a course of affairs are not difficult to discover Underlying all others is the remarkable increase in the number and variety of activities which states nowadays undertake, or at least regulate—not stopping short of regulating boxing and horse-racing, and there are plenty of other things which well meaning people think still should be added to the list Since the legislature usually has neither the knowledge nor the time and means to do more than institute very broad controls, every such activity tends to require new administrative machinery, both for rule-making and for enforcement Offering such challenges are banks and insurance companies, railroads, telegraph and telephone systems, and other public utilities, industry and labor, education, health, charities, agriculture, commerce, conservation, public works, and police In any such area, and in many lesser ones, when the legislature once commits itself to a program of control or service or both, it opens the door wide to administrative expansion, for not only does it frequently fail to consider whether a new function might not properly be performed by some agency already existing and instead simply tack on a new one, but any agency introduced tends to magnify its importance, expand its activities, plan for bigger things in the future, call for larger and larger staff, demand increased appropriations, and usually end by dividing and subdividing into branches, some of which may in time outgrow their environment, split off, and start the whole process over again Thus, as some one has remarked, state administration grows by what it feeds on—authority granted in statutes, appropriations, and self developed, or even popularly stimulated, ambitions It grows, too, for another reason In times past, offices and boards sometimes were created mainly or solely with a view to fattening the "spoils" available as rewards for party services The purely partisan aspect is perhaps less prominent now But that does not lessen the average legislator's interest in plentiful jobs for his friends and supporters, and the way to multiply jobs is to set up boards, commissions, offices, bureaus, and start them on the sure road to expansion and proliferation

## TYPES OF ADMINISTRATIVE AGENCIES

To the traditional isolated and largely autonomous "executive," or "constitutional," offices touched upon in the previous chapter, administrative expansion has added two main types of agencies (1) departments and (2) boards and commissions

1 Departments

States which have seriously undertaken to put their administrative house in order usually have sought to gather most agencies into a limited number of more or less coordinate departments, and in such states, *e g* , Illinois and New

Jersey, the integrated department, presided over by an appointive director, commissioner, or other chief, is likely to be the most conspicuous feature of the administrative system Elsewhere, too, departments are found, although sometimes more loosely organized and in any event casually intermingled with other single- or multiple headed agencies in a nondescript pattern Departments most commonly encountered are those of finance or revenue, highways, agriculture, conservation, public health, public welfare, and public instruction

2 Boards and commissions

When a state embarks upon some major new activity, the legislature normally must decide whether to entrust the function to a single-headed department or other establishment, or to a board or commission of three, five, or more members If the work requires quick and certain decisions culminating in swift and vigorous actions, as in a field like police administration, the verdict is likely to be for the former If, on the other hand, it calls rather for investigation, deliberation, weighing of different points of view before decisions are reached, a plural agency is likely to be thought preferable In general, the great vogue of boards and commissions arises from such considerations as (1) that in formulating policies on education, public welfare, and the like, several heads are better than one, (2) that in a plural agency different interests and schools of opinion can find representation, (3) that overlapping terms for members promote continuity of policy and action, and, (4) that, with power diffused among several persons, appointment is rendered less attractive to mere politicians—although, on the other hand, plural agencies sometimes have been favored because of multiplying the chances for jobs Most legislatures in the past 50 years have been inclined to act on the principle, "When in doubt, establish a board or commission"

Boards and commissions distinguished

Where a board is employed, the chances are that it will consist of persons serving in merely an advisory, or supervisory, capacity, and devoting only a small part of their time to the activity, without pay, while the actual administrative work is carried on by subordinates Often part or all of the members serve *ex officus*, and members generally are not experts, or at any rate technicians, in the field of work they supervise Familiar examples are boards of health, boards of education, boards of agriculture, pardon boards, and boards overseeing the management of charitable and correctional institutions Members of commissions, on the other hand, usually are expected to perform, or at any rate to direct, the actual work of administration, to be experts in it, and to give all of their time to it, with pay When, also, an administrative agency is clothed with quasi legislative or quasi judicial powers, it generally is called a commission rather than a board, although the distinction does not always hold, even in the same state—the two terms often being used loosely and interchangeably Important examples of commissions, as distinguished from boards, are railway or public service commissions, industrial commissions, tax commissions, and civil service commissions

Powers wielded by boards and commissions naturally vary At one extreme, such agencies merely investigate, recommend, and perhaps issue licenses, at the other, they (notably boards of health and public utility commissions) exercise broad quasi legislative and quasi-judicial authority, includ-

ing issuing orders and regulations with the force of law Over their internal organization, however, *e g*, size of staff, classification of employees, and salary ranges, nearly all have comparatively little control, such matters usually being regulated by the legislature

## ADMINISTRATIVE REORGANIZATION

Common defects

Forty years ago, the administrative machinery of nearly all states was an unplanned conglomeration of isolated offices, departments, boards, and commissions, and such it still is in half or more of the number where the executive is "weak and reorganization neglected Three defects are especially common (1) In any well-ordered administrative system, each agency or unit, on its appropriate level, should have a clearly defined field of activity, and all closely related functions in that field should be concentrated in the one agency Far from such a situation actually existing, however, related functions and duties often are divided among two or more officers, departments, or boards doing their work quite independently (2) Over scores of boards, commissions, and other agencies, there often is no unifying or coordinating authority and only very slight directive or supervisory control Confronted on all sides by officials most of whom he does not appoint and many of whom he cannot remove with terms differing from his own, and frequently with duties so rigidly prescribed by statute as to leave little room for discretionary executive control the governor usually can do little to achieve unity, harmony, and efficiency, while the legislature, largely responsible for the situation, has time and aptitude for doing even less (3) At best, state administration tends to be uneconomical In some 40 states, it is true, large gains have flowed from substitution of centralized purchasing for former practices under which each establishment and institution bought its own materials and supplies But in the many states in which administrative agencies are over multiplied, functions duplicated, and little integrated control exercised, waste inevitably ensues Often a modern and uniform accounting system is lacking, perchance even a really effective budget system Yet here is where the legislature is beset by the greatest number of competing agencies clamoring for funds, as well as by the largest swarms of lobbyists supporting the demands of this agency or that

Early efforts at improvement

As early as 1891, Governor William E Russell laid before the legislature of Massachusetts a report showing the defects of the state's administrative system and recommending a reorganization Neither he nor similarly interested executives in other states, however, could stir much response, for of course most of the impediments—inertia, vested interests, and the like—which long have hampered administrative reorganization in the federal government operate with at least as much force in the states After 1900, professional students of government turned attention to the subject, with taxpayers also developing concern because of mounting governmental costs, and in the next decade and a half extensive reports and plans were presented in a number of states, usually by special "economy and efficiency" commissions, and

capped by a full scheme of reorganization and consolidation prepared by the New York Bureau of Municipal Research and submitted to the New York constitutional convention of 1915 Through legislative rejection, defeat at the hands of the voters, judicial rulings of unconstitutionality, or simple lack of interest, one plan after another failed A more favorable atmosphere, however, gradually was created, and in 1917 the effort s first signal triumph was achieved

The Illinois civil administrative code (1917)

This victory took the form of adoption by the legislature of Illinois, under the leadership of Governor Frank O Lowden, and following exhaustive preliminary studies by a staff directed by Professor John A Fairlie of the first comprehensively streamlined administrative system found in any state A civil administrative code, embodying the reform, abolished over 100 statutory offices, boards, and commissions and consolidated their functions in nine departments, namely, finance, agriculture labor, mines and minerals, public works, public welfare, public health trade and commerce, and registration and education—to which were added in 1925 a department of conservation and a department of purchases and construction and still later, departments of revenue public safety, insurance, and aeronautics, with trade and commerce and purchases and construction dropped out At the head of each of the present 13 departments at Springfield is a director appointed by the governor and senate for a term of four years, coinciding with the governor s term, and under each director are an assistant director and heads of bureaus, also appointed by the governor and senate, but of course immediately responsible to the department head Some boards and commissions, *e g*, a mining board and an industrial commission, survive, but in nearly all cases only as units within a department and with only quasi legislative and quasi-judicial functions retained All told, administrative consolidation has been carried about as far as the legislature can go without amendments to the constitution, and it is this qualifying limitation that accounts for the system's principal defect, *i e* continued popular election of most of the state constitutional officers, leaving the governor with still incomplete control over the state administration

Reorganization in other states

Conditions which Illinois had sought to remedy were prevalent everywhere, and naturally other states were influenced by the example afforded In 1919, Massachusetts, Nebraska and Idaho reorganized, in 1921, Ohio, Michigan, California and Washington, in 1923, Maryland, Pennsylvania, Vermont, and Tennessee, in 1925, Minnesota and South Dakota, in 1927, New York and Virginia, and so the list grew—the most recent addition being New Jersey in 1948—until today the number of states boasting a more or less thorough reorganization is close to 30 In others, reorganization, after being carefully planned proved abortive This happened in Montana and North Dakota (1945), also in Louisiana (1940) and Indiana (1941), where all or substantial parts of reorganization plans were invalidated by the courts

New York and New Jersey

Of special significance are the reorganizations carried out in New York in 1927 and New Jersey in 1948 In the former state, a constitutional amendment was adopted in 1925 providing for a complete overhauling of the state's

administrative "systems", and two years later the necessary legislation was enacted, with some 180 administrative agencies consolidated into 18 departments,[1] the heads of which, with four exceptions, are appointed by the governor and senate New York, indeed, is one of only four states that have gone so far as to amend their constitution in order to clear the way for reform[2] New Jersey might, perhaps, be regarded as a fifth, for there, reorganization was achieved through a new constitution In any case, the New Jersey reorganization undoubtedly is the most thorough in any state As indicated earlier, the New Jersey governor now is the strongest of all "strong" governors—the only state executive officer elected popularly, with power to appoint, and in most instances independently remove, the heads of all of the not to exceed 20 departments into which all administrative agencies (except a few temporary commissions) have been gathered, and with full power also to direct them, to investigate the conduct of any other state executive official, and, under certain procedural safeguards, to remove him

Results

How effective has all of this reorganizing effort proved? To what extent have the hopes and promises of the reformers been realized? Of course no single answer covering all states and situations is possible, only painstaking studies, state by state and with minute comparison of conditions before and after, could supply a full basis for judgment Besides, what happens in particular states depends upon many variables such as the form and degree of reorganization undertaken the political atmosphere in which a new system must operate the attitudes and abilities of officials (especially governors) in carrying out plans which they individually may not have favored Such surveys, however, as have been made—backed by a great deal of practical experience and intelligent observation—justify the conclusion (1) that reorganizations generally have materially reduced the cost of state government, (2) that by concentrating direction and control in a stronger executive they have imparted to the management of state affairs a degree of unity and coherence previously lacking, and (3) that by thus integrating and clarifying responsibility, they have made it easier for taxpayers to know who should be held accountable for what is done and for how their money is spent

A continuing task

In any case, the reorganization movement is only in mid stream (1) More than a quarter of the states have as yet hardly been touched by it (2) A good many which nominally have reorganized have made only an imperfect job of it, effecting some consolidations, converting some elective offices into appointive ones, and giving the governor some additional powers, but stopping far short of any comprehensive reconstruction (3) Some states, after reorganizing, have slipped back, in the sense that politicians have been able to sabotage reforms operating to their disadvantage, and with the people either unaware of what was happening or not sufficiently interested to do anything about it Finally, (4) an administrative system is not a piece of machinery to be put in order and expected to run without further attention In too many

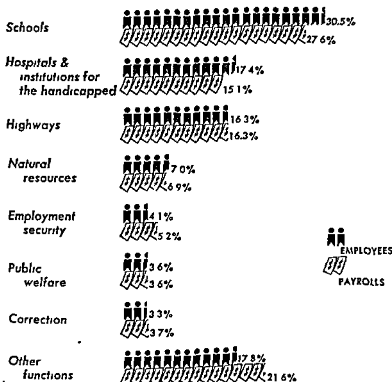
[1] Under a constitutional amendment a department of commerce was added in 1944

[2] The others are Massachusetts Virginia and Missouri On his own initiative the governor of New York also introduced a cabinet consisting of the heads of all but five of the new departments

states, a good plan once set in operation has been allowed to get out of repair and out of date All in all, with the possible exception of New Jersey, not a state administrative system in the country today meets every test which an expert in the administrative process would impose

Little Hoover commissions

Of late, however, increased awareness of this situation has been encouragingly reflected in a new wave of reorganizing activities Forty years ago, an economy and efficiency commission appointed by President Taft to investigate national administration gave the newly developing reorganization movement in the states considerable impetus In our own day, another federal investigating body—the Hoover Commission—has served similiarly to focus attention upon administrative organization and reform on all levels, and in 1949-50 more than 25 states instituted studies looking to more or less drastic administrative changes, and carried on in some instances by the legislative council (as in Nebraska and Idaho), in others by an interim or other legislative committee



(as in North Dakota), in still others (*e g*, Connecticut, Illinois, Indiana, and Minnesota) by specially created 'little Hoover commissions" under various names and grants of authority In a few states, too, practical results of these efforts have begun to be realized

## HIGHER ADMINISTRATIVE PERSONNEL

Appointment election spoils

There commonly has been an almost total lack of uniformity—even within the same state—in the methods by which higher personnel in the various administrative agencies is selected, in length of terms, in modes of removal, and in form of compensation In New York, for example, prior to the reorganization of 1927, seven of the 187 principal state administrative agencies were filled by popular election, seven by the legislature, and 15 by appointment by the governor alone, while 14 were *ex officio,* 17 were partly *ex officio* and partly appointed by the governor, 68 were appointed by the governor and senate, and the remainder were designated in a bewildering variety of ways Though gradually being restricted, popular election still is commoner than it should be But appointment does not always work well either, both because of senatorial confirmation and other restraints imposed on the governor and because of spoils considerations too often dominating On account of not being drawn from a single political party, many state boards and commissions are fondly termed nonpartisan Even a cursory glance usually will reveal, however, that what they really are is *bipartisan* with members carefully divided between the two major parties Representation of the principal minority party originally was intended to serve as a check upon the majority party and to mitigate the evils of partisanship in administration In practice, however, the arrangement often results in bipartisan agreements on the distribution of patronage, in dispersion of responsibility for the quality of the work performed, and in prevention or frustration of investigations that might prove damaging to both parties represented

Removals

There likewise is no uniformity in methods of removal In most states, some or all principal state officers can be impeached, and for offenses less serious than are specified on the federal level The procedure, however, always is cumbersome, and seldom is it invoked Despite reorganization, there still are in New York, besides impeachment, no fewer than seven distinct ways of removing department heads and other principal officials, less than one-half can be removed by the governor on his individual responsibility, and in other states the situation is not essentially different—although where the strong type of governorship prevails (notably in New Jersey), the chief executive's power of removal usually has been increased In about a dozen states, higher elective officials can be removed by means of the recall

Term and compensation

The term of some administrative officers is fixed by law and coincides with that of the governor, in the case of others, there is a fixed term which does not coincide with the governor's, while in still other instances the term is left more or less indefinite Terms of members of boards and commissions are arranged to overlap, not only to promote continuity of policy, but also to make it ordin-

arily impossible for all members to be appointed by any one governor Not only, of course, in amount, but also in form, compensation, too, is highly variable Most officials have a fixed salary, others get no salary, but are paid by the day or by fees, still others, including most board members, are allowed only their actual expenses

## THE STATE CIVIL SERVICE

Civil service laws

For carrying on most activities intrusted to them, departments, commis sions, and other agencies must of course rely upon subordinate officers and employees, sometimes mounting to 60 000 or more in a single state and in April, 1951, numbering the country over, 869 000 full time and 173 000 part time Until late in the nineteenth century, distribution of such positions among personal and political friends of appointing authorities was largely taken for granted, and more than anything else, this prevalence of spoils ex plained the inefficiency with which many state and local functions were per formed when judged by standards prevailing in private business To a degree, the situation has now been corrected Starting with New York in 1883 and Massachusetts in 1884, merit systems applying to all or most administrative personnel have been introduced by law in practically half of the states, and in every one of the 48, employees in at least certain specified departments or agencies are covered [3] Even so great a gain however, leaves state civil service reform still a problem to be solved before the country can claim to operate its government truly on a merit basis Where existing service-wide state laws are modeled on the national civil service act of 1883 and include provisions for classification of state employees competitive examinations for appointment and promotion (with some arrangement in almost half of the states for veteran preference), and clauses prohibiting appointments and removals for political reasons

Civil service commission

To administer a measure of the kind there usually is a small bipartisan civil service commission (or state personnel board), appointed by the gov- ernor and senate, and however wisely a law may be drawn, the success or failure of the system instituted by it depends heavily upon the quality of this agency In the hands of an indifferent or hostile commission, the best law can be made a farce in practical operation And this sometimes has happened when the commissioners have been purely political appointees, closely identi fied with the spoils system which they were supposed to check or eliminate, and merely reflecting a partisan governor's own attitude toward the merit prin- ciple In some states the incongruity of a bipartisan board administering a nonpartisan personnel system is at least partly overcome by employing a non political personnel director as executive officer

[3] [illegible] the federal Social Security Act in 1939 every state [illegible] been [illegible] tance [illegible] incil

Newer functions

Until rather recently, civil service commissions—national, state, and municipal—have practically everywhere confined their activities to the prepa ration and supervision of competitive examinations as a basis for making up ' eligible registers on the assumption (shared by the general public) that *their main if not sole function was to prevent spoilsmen from preying* upon the public service That function of course continues highly important and always will be so Both the federal and some state commissions however, have come to appreciate that their work cannot properly be of merely this some what negative nature that on the contrary in different direct and positive ways they can contribute to the advancement of adminisration in general. And by devising and putting into operation new methods of measuring and increasing the efficiency of state employees by stimulating in them ambition for promotion by providing them opportunities for in service training by establishing uniform standards of compensation and by carrying on programs of personnel research a few state commissions now are emulating the federal agency with very commendable results

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# CHAPTER 40

## The Expanding Pattern of Controls and Services

Under our federal system, the states with their broad reserved powers, have from the beginning had wide scope for dealing with the economic and social concerns of the people Originally, this did not actually mean a great deal, because sparseness of population simplicity of living and working conditions, and a lingering *laissez faire* tradition left government on the state level even less to do than on the national or local From this situation, however, we gradually came to one entirely different Business grew complex, inventions revolutionized transportation and communication, industrialization raised labor problems, the farmer developed new needs, demands for welfare activities multiplied, and from state legislatures flowed an ever-swelling stream of measures empowering or requiring state authorities to undertake functions and services which, if previously undertaken at all, were left either to private enterprise or to local government units—functions and services often having little or no relation to the purposes of government as at one time conceived As a result, despite the familiar expansion of federal activities in many of the same fields, state governments never have exercised more controls or provided more services than at the present day For purposes of very brief summary, two main categories may be noticed (1) controls and services in three primary occupational areas—business, labor, and agriculture, and (2) controls and services in the interest of general welfare

Changes since early days

### PROMOTION AND REGULATION OF PRIMARY OCCUPATIONAL INTERESTS

#### 1 BUSINESS

By virtue of its police power, a state is entitled to regulate all business activities within its borders except such as have been instituted by the national government or involve transactions in foreign or interstate commerce A good while ago, the courts developed a category of businesses, including public utilities, banks, and insurance companies, regarded as of peculiar concern to the public, and hence in a special sense "affected with a public interest", and these were viewed as justifying and requiring more intensive regulation than business in general Hardly a form of business, however, is not now of con-

Basis of state control

cern to the public in one way or another, and while the "public interest" concept has by no means been discarded, the present tendency is to look upon all businesses as subject to whatever regulation may be required for protecting public health, safety, morals, and welfare—so long as there is no deprivation of life, liberty, or property without due process of law, or denial of equal protection of the laws

**Corporations**
**1 Status**

Although there are professions, such as medicine and dentistry, which one may not practice without state license, many people engage in business, (usually on a modest scale) requiring no government authorization Most medium-sized and larger businesses, however, are carried on by partnerships or corporations not only publicly authorized but subject to state (perhaps also federal) control The formation and dissolution of partnerships and the rights and liabilities of partners are amply covered by law, and no corporation can operate, or even exist, without a charter, coming in nearly all instances from a state and itself supplying a considerable measure of regulation Originally, corporations were chartered individually by special legislative act From this however, arose so much favoritism and corruption that even before the Civil War most states substituted the enactment of a general statute under which any responsible group of persons desiring to incorporate may do so by meeting prescribed conditions and applying to the proper administrative authority, usually the secretary of state, and today nearly all state constitutions either forbid incorporation by special act or severely restrict it A corporation charted in one state almost always may do business in other states, but only as a "foreign" corporation subject not only to the same regulations as 'home' corporations, but also to any special requirements that may be imposed upon it or its class

**2 Regulation**

With charters usually easy to obtain and operation under them commonly advantageous, the corporate method of doing business has become general, and in every state regulation of business tends to resolve itself into regulation of corporations—their rights, responsibilities, management, financing, and procedures Only a few phases can be mentioned here

**(a) Anti trust laws**

Early in the history of corporate enterprise, concern was stirred by the rise of business combinations prone to squeeze or drive out competitors, control prices, and indulge in other monopolistic practices, and much legislation aimed at curbing "trusts" was enacted With business taking on an increasingly interstate aspect, the problem fast outgrew the capacities of the states, and in 1890 the Sherman Anti-Trust Act brought the federal government upon the scene Practically all states still have copious anti trust laws (applicable, of course, only to strictly intrastate situations and actions), also codes of fair business practices similar, within their spheres, to the national laws enforced by the Federal Trade Commission No special administrative agency, however, is charged with enforcement, rarely has the attorney general either time or means to do much, most business is interstate and cannot be touched by state authority, and, speaking broadly, for whatever protection they get against monopolistic and other harmful business practices, people nowadays have to look rather to Washington than to their state capitals

(b) Banks and other financial institutions

Two commercial banking systems exist side by side in the United States—national and state National banks, of course, are chartered and regulated by the federal government, but state banks by the several states[1], and state control, within its field, extends to bank organization and management, capital stock, liabilities of stockholders and directors, assets and investments, loans, reserves, and arrangements for periodic inspections by representatives of the state banking department or other designated agency Trust companies, building and loan associations, and similar financial institutions are regulated in much the same manner

(c) Insurance companies

Every state also regulates all forms of insurance, with a view to protecting the public against exorbitant rates, requiring companies to honor valid claims for insured losses, and, in the case of life insurance maintaining the security of invested savings General laws prescribe the conditions which a corporation must meet in order to engage in insurance business in the state Usually each company and all of its agents must be licensed by an insurance department or other authority, detailed regulations cover forms of policies, reasonableness of rates, types of securities in which funds may be invested, and volume of reserves that must be held for covering policies as they become payable, and full provision always is made for periodic reports and for official inspections as in the case of banks

(d) Public utilities

Although usually owned and operated by private persons or concerns, railroads, street railways, air transport, and bus and cab lines, and all enterprises providing electric light and power, water, gas, and telegraph and telephone services, are preeminently "affected with a public interest,' enjoy special privileges (*e g*, use of highways and streets), and either are or tend to become "natural monopolies", and, except in so far as interstate, all are subject to state, and in varying degrees also to local, control Voluminous laws dealing with permits and franchises, financial structures, securities issues, accounting and reporting, quality of services, rates, and safety and convenience for the public are enforced in every state except Delaware through a public utilities commission or its equivalent

## 2 LABOR

Basis of state authority

As long as the country remained predominantly agricultural, labor required little attention from either federal or state government After the Civil War, however, rapid growth of industry and commerce, concentration of workers in large plants, and labor management tensions associated with the rise of unions opened a vast new field for public action The federal constitution says nothing about labor, and for a good while protective and regulatory legislation was left almost entirely to the states, which, under their broad police powers and within their own borders, were handicapped by no lack of authority But as the national economy continued expanding, with employment increasingly connected in some way with interstate and foreign

[1] State banks which are members of the Federal Reserve System or are protected by the Federal Deposit Insurance Corporation are also regulated by these federal agencies

commerce, deficiencies of state control began prompting federal action, and, as shown in an earlier chapter, labor legislation and the enforcement of labor regulations have developed, especially since 1933, into a major federal concern Even yet, nevertheless, millions of workers produce only for intrastate commerce, and accordingly, as workers, are subject only, or at any rate mainly, to state authority, and a few ways in which states meet the resulting need may be mentioned

Services and controls

(1) The first necessity of workers is employment, their greatest hazard the lack of it, and through federally aided public employment offices practically every state now concerns itself with finding jobs for people in need of them (2) Even in good times, workers are "laid off" or lose their jobs, and, again with federal encouragement and supervision (under the Social Security Act of 1935), every state maintains an unemployment compensation system supported by payroll taxes and providing cash benefits designed to carry workless laborers for varying periods without necessity of applying for public relief (3) Laws protecting health and safety of workers have multiplied on state statute books Aimed especially at health are measures restricting the hours of continuous work for women in industries, stores, and hotels, forbidding employment of women in mines, regulating the labor of children not covered by the federal Fair Labor Standards Act, requiring proper heating lighting, and ventilation and the removal of dust and noxious fumes in factories, and fixing standards of sanitation And directed at safety are laws requiring protection from dangerous machinery, provision of fire escapes, equipment of street cars, buses, and local trains with precautionary appliances safeguards for laborers on buildings, bridges, and other public works, and periodic inspection of factories, workshops, and mines (4) Occupational accidents not caused by carelessness or willful negligence of the injured worker now are regarded as a proper charge upon an industry or business, and all states have workmen's compensation laws, some compulsory and some optional, some applying to all accidents and others only to those in the more hazardous occupations More than half of the number also grant compensation for some or all occupational diseases (5) In the broad field of labor-management relations, every state, especially if highly industrialized, encounters within the more restricted but still important sphere of intrastate industry, substantially the problems, tasks, and difficulties already outlined in connection with the labor-management concerns of the federal government And most of the number regulate labor unions, strikes, and picketing, 10 or 12 have general 'labor relations acts', and all but about 11 maintain mediation and conciliation services

## 3 AGRICULTURE AND CONSERVATION

Not only because agriculture and natural resources are important in the economy of every state and in most instances basic, but also because members from rural districts preponderate in nearly all legislatures, state activities pro-

moting and to some extent regulating agriculture and conservation fully match those in the fields of business and industry Ample constitutional authority is supplied both by the police power and by the power to levy taxes *and spend money for general-welfare purposes*

Agricultural services

(1) Every state maintains an agricultural college and in connection with it a federally aided agricultural experiment station, and in these institutions studies are carried on relating to soils and fertilizers, land use, the breeding and care of plants and livestock, agricultural marketing, and indeed practically every resource, operation, and activity of concern to the farmer With research goes also education in classrooms and laboratories in extension courses, and through publications and demonstration work (2) Aside from bad weather and adverse marketing conditions, the principal agricultural hazard is a legion of plant and animal diseases and pests, and in every state such scourges are studied and so far as possible curbed or eradicated (3) Because so largely interstate, agricultural marketing falls mainly within federal jurisdiction Room remains, however, for state (1) regulation of the grading, packaging, and labeling of products, (2) control of marketing through commission merchants, (3) encouragement of farm cooperatives (for buying as well as selling and shipping), (4) assistance to state and local agricultural fairs and (5) country-wide advertising of the state's products

Conservation

Closely related to promotion of agriculture is the mapping, development, and conservation of natural resources On the legal theory that wildlife is owned by the state and held in trust for the people, practically all states license and otherwise control hunting and fishing, and also carry on propagation activities at game farms and fish hatcheries Forest lands are protected against fire, private owners are encouraged and aided in forest development, in some states by "forest crop laws" deferring taxation of growing timber, three fourths of the states maintain state forests, and others develop and protect county or other local forests, for both conservational and recreational purposes For 50 years, states having *important oil and gas resources have* combated waste, first with regulations designed to prevent unchecked flow and to control the spacing of wells, more recently also, and chiefly, in the case of oil, with production quotas fixed and enforced by some administrative agency and in 20 states operated under an interstate compact on the subject Of particularly wide concern, too, is soil conservation, carried on in conjunction with the federal government in more than 2,200 soil conservation districts, established in the several states (with all 48 cooperating) under supervision in each case of a state soil conservation committee and operated by district boards of supervisors or directors in part *locally chosen*

## PROMOTION OF GENERAL WELFARE

In activities thus far reviewed, elements of state regulation and state service are intermingled, but with *regulation usually primary In others to be* touched upon, regulation is present, but with service commonly dominant—

service to the people generally or to particular classes or groups standing in special need of it, and in all instances based constitutionally on the police power, backed by the broad guarantee of the Tenth Amendment

## 1 EDUCATION

A major government function

From early days, Americans have firmly believed that free government can be maintained and general welfare advanced only where the people are literate and informed In spite of their tolerance of private and sectarian schools, they also have considered education a proper and necessary function of government and, at least in later times, have insisted that school facilities be made available everywhere without charge as a public service In consequence, education now is the largest single enterprise undertaken by state and local governments, with public-school property valued at more than $8 billion, annual expenditures totaling almost $3 billion, and upwards of a million teachers caring for nearly 24 million elementary and secondary pupils Publicly supported universities, teacher-training institutions, and professional schools, too, are found in all states, and programs of vocational and other adult education are widely in operation

Primary responsibility of the states

Education is an activity on which the federal constitution is silent, and this leaves responsibility mainly with the states In earlier days, it is true, the federal government assisted with grants of land and money, it now aids state agricultural colleges, vocational education in and outside of high schools, and other special programs, and if current effort succeeds, it will, as a matter of permanent policy, come to the relief of at least elementary and secondary education, the country over with liberal subventions But even if, as some people fear, such assistance should result in broader federal control over educational policies the states undoubtedly would continue primarily responsible

Trend toward centralized state control

A problem confronting the legislature of every state is that of the pattern of organization for educational purposes Until near the middle of the nineteenth century, it is true, not much thought was given this matter, schools developed and were supported locally, in districts or towns and townships, with the states as such giving little aid or attention Petty local units, urban and rural, still are extensively employed—in 26 states the school district, in nine the town or township Growing recognition, however, of inadequacies and inequalities bound to arise among such independent units with widely differing populations and resources has so far changed the picture that not only do such units nowadays constantly feel the hand of the state through financial aids and curricular and other regulations, but 12 states have gone over to a county unit system and one (Delaware) has arrived at what is in effect a state-unit arrangement The tendency, in other words, is toward shifting school operations from smaller to larger areas, and if it continues (as doubtless it will), the country should finally arrive at an integrated, state managed school system considerably superior to anything known in the past

Forms of control

Meanwhile, whatever the existing organizational pattern, states have vastly increased their direct educational services by (1) enacting basic legislation

requiring a state wide system of schools and specifying how it shall be operated, (2) regulating through a school code matters formerly left to local authorities, *e g*, the training examination, licensing, payment, and retirement of teachers, compulsory school attendance, subjects to be taught, text books, libraries, school house construction, medical inspection of school children, and various other things, (3) introducing arrangements under which [illegible]

[illegible]

[illegible] depa[illegible] of educa[illegible] and usually [illegible] by a state board of education, and (5) maintaining not only higher institutions but special schools for the blind the deaf and dumb the feeble minded and other handicapped groups Under systems of state aid found in all states from some 20 to over 60 per cent (an average of about 40 per cent) of the cost of local public education—formerly met almost entirely from proceeds of the local property tax—comes from the state treasury thus bringing support from richer parts of the state to poorer ones and fulfilling the basic theory of education for all the people as a primary state function

## 2 PUBLIC HEALTH

Health a a state responsi bility

With five million people in the United States ill on any given day, 70 million in the course of a year, and over a million physicians nurses and others caring for the sick at an annual cost of $3 5 billion, it is not necessary to argue for public health as a major sector of general welfare Here again silence of the federal constitution throws responsibility primarily upon states and localities, and although federal agencies long have rendered assistance through research and advice with subventions from the federal treasury also available for certain purposes the states still will carry much of the burden if nation wide health insurance as urged by the Truman Administration, becomes a reality

Local and state organiza tion

The earliest public health authorities were part time boards and officers in towns, townships villages, and cities, with usually few functions beyond abating nuisances and quarantining against communicable diseases After about 1908, a new stage was reached when county wide health services, with full time health officers and staffs of inspectors and nurses, began to be introduced, and by 1951 legislation in more than two-thirds of the states authorized health organization in this form, or as an alternative where the resources of individual counties were insufficient, on a county-city or multi-county basis More than 18 000 local government jurisdictions—counties, cities townships villages, and special districts—still bear responsibility for local health services To some extent, the ill effects of such extreme decentralization have been overcome by the rise of state departments of health starting with a state board of health in Massachusetts in 1869, and since 1909 every state has had such a department or its equivalent, with nowadays usually an unpaid advisory board of from three to 15 members, a full time salaried health commissioner or other officer as administrative authority, and under him bureaus or divisions

specializing in vital statistics, control of communicable diseases, maternal and child health, and other matters

Functions

Under any plan of organization, state and local health functions inevitably merge, but a few for which the states are primarily or solely responsible may be enumerated

1 Regulating by law the conditions under which persons may be licensed to practice medicine dentistry, pharmacy, and related professions, and usually also providing facilities for training in these fields

2 Collecting preserving and publishing state wide vital statistics, covering births, morbidity (sickness), and mortality

3 Making and enforcing regulations for the control and eradication of preventable and communicable diseases, not only by quarantines and the like, but by vaccines serums, and other preventives

4 Waging war on particular maladies like tuberculosis, cancer, venereal diseases typhoid fever, and malaria

5 Protecting lakes streams and harbors from pollution, and suppressing unsanitary conditions in general as in connection with sewage disposal

6 Inspecting dairies, slaughterhouses water supply, ice plants food processing establishments, restaurants and hotels and regulating the handling of food in all forms, and also the manufacture and sale of drugs

7 Operating hospitals both general and for mental tubercular, and other particular types of patients

8 Maintaining special programs of mental hygiene, maternal and child hygiene (every state now has such) and industrial hygiene, and often a diagnostic laboratory service

9 Educating the public, through newspapers, pamphlets lectures films and radio broadcasts on health topics of great variety

## 3 PUBLIC WORKS—HIGHWAYS

States as builders

Every state must, of course, provide itself with public buildings, e g a capitol, frequently a state office building, university and other educational structures, hospitals, and asylums Some have built airports, a few have constructed harbor works, and New York built, owns, and operates the Erie Canal Supplementing federal action, dams and reservoirs have been constructed for flood control, and parks and forest preserves have been laid out and provided with suitable buildings and other facilities By all odds, the most important public works with which any state has to do, however, are highways, and these alone call for comment here

Highways become a state concern

The record of highway construction, financing and administration in this country is a story of progressive shifting of activities from smaller areas to larger ones, until finally the states came into substantial control, although sharing heavily with the national government under the federal aid system Originally, roads were built and repaired by local communities only Quite early, however, towns and townships took over, and in time the function widely passed on upwards to the county, still in most states the principal unit for highway purposes Finally, in the early nineties, Massachusetts and New Jersey led the way to construction and management of all main roads, and sometimes of lesser ones, by the state

County and township roads still comprise some 75 per cent of the country's total highway mileage The motorist usually tries to avoid them, because less than half of the 2 4 million miles (in 1946) is surfaced, and but little of that with high grade paving, and altogether they carry less than 15 per cent of the nation's total traffic As farm to-market roads and as feeders to the state system, they, however, are indispensable Purely farm to market roads are controlled in some states mainly by towns or townships, in others by counties, while roads of a little more importance, often described as 'secondary" and linking up county seats and other such centers, usually are chiefly county-controlled—but always with a tendency for the former to be transferred to the county and the latter to the state More precisely, the over all picture from this point of view is that (1) four states *i e*, Delaware, Virginia, West Virginia, and North Carolina, have centralized the management and financing of *all* roads in the state government, (2) four New England states divide responsibility for farm to market and secondary roads between the state and the towns, (3) 27 states divide it between the state and the counties, and (4) the remaining 13 apportion it three ways *i e* among state, counties, and towns or townships In all cases in which local units function, funds come in considerable measure as aids from the state treasury "Primary" roads, comprising the *state* system, constitute only a quarter of total mileage, but link up the principal cities, usually are well paved, and carry 85 per cent of the traffic All are heavily subsidized by the federal government and built and maintained in close cooperation with the supervising Bureau of Public Roads in the Department of Commerce at Washington

The highway situation today

To manage the states' public works, legislatures have created a variety of administrative bodies Sometimes a department of public works has jurisdiction over works of practically all kinds, but more commonly different departments administer only some one type of undertaking All states, in any case, have either a separate highway department or a highway division of a public works department, usually the former, by federal requirement they indeed must have one or the other to qualify for grants in-aid In about one third of the number, the department head is a full time, salaried highway commissioner or director of highways, in the remainder, a part time highway commission of from three to seven members, functioning through such a commissioner or director and commonly appointed by the governor, although in some instances elective In counties, highway functions sometimes are kept in the hands of the county board, but often are intrusted to an appointive or elective highway commissioner or superintendent, while in townships the road officer usually is an appointive or elective commissioner or supervisor [1a]

Administrative arrangements

[1a] City streets of course, form parts of the general highway system but (although sometimes state or county aided) are separately managed by municipal authorities

## 4 PUBLIC SAFETY—POLICE

General aspects

Science and technology have vastly increased the conveniences and comforts of modern life, but also its hazards, and governments on all levels find it necessary to devote far more attention than formerly to matters of public safety Instrumentalities of interstate and foreign commerce—railroad, steam ships, airplanes, motor buses, and the like—are subject to continuous regulation and inspection by federal agencies, and in their intrastate operations by state authorities as well Ordinary motor car operation, factories, workshops, and mines are state-regulated, and, within their spheres, and as state agencies local governments likewise have responsibilities Every state has voluminous statutes, rules, and regulations aimed at preventing automobile accidents, railroad wrecks, steamship and mine explosions, injuries in industrial plants, dangers from fire and flood, and other perils, and while the administration of such regulations—chiefly through orders issued and inspections made—is necessarily divided among departments and establishments functioning in different fields, the total of personnel employed and funds spent usually is impressive Moral safety, too, especially for the young, is promoted by regu lation of the liquor traffic and in some states, like New York, by censorship of motion picture films

State police

Protection of public safety is but one aspect of the broad, inherent, reserved police power of the states by which they maintain public order, safeguard life and property, and restrict individual and corporate conduct in the interest of the public welfare, and the resulting police function embraces the enforce ment, not only of all pertinent provisions of the state constitution and of statutes, but also of all ordinances, rules, regulations, and decisions issued by state and local officials, including the courts Chief executive officers (espe cially the governor and attorney general), numerous departments, com missions, and boards, county sheriffs and prosecuting attorneys, mayors and city police forces, even township constables (together with the courts within their special province)—all share in the responsibility From such wide dis tribution, however, certain weaknesses arise, and with a view to overcoming them and advancing public safety in a domain of major importance in this motor age, all states have at least gone so far as to institute a highway patrol and 25 or more have gone farther by creating a state police superimposed upon the police establishments of counties, cities, and other local areas, cooperat ing with them (especially in rural areas) and supplementing their activities With trained personnel organized and officered along military lines, a state police force exercises general police powers throughout the state, performs the function of highway patrol which elsewhere falls to a force having patrol duties only, assists local police officers in apprehending offenders, and at times of disaster, helps prevent destruction of property and loss of life About half of the states further reenforce the work of local police officers by maintaining state bureaus of criminal identification and investigation

Use of state militia

Unfortunately, situations sometimes arise, especially in connection with strikes or other industrial disorders, where obstructions to law enforcement

and threats to public safey are offered by combinations too powerful for the local police or the courts to handle, yet without state police being available, and in such emergencies the sheriff of the county or the mayor of the city most concerned may appeal to the governor, who, as commander in-chief of the state militia, is empowered by the state constitution to call out militia (National Guard) units to do police duty in protecting life and property For effective police work, however, militia units are not particularly fitted, and in states that maintain them, state police forces commonly are found more satisfactory

State Guard units

When, as in 1940 war or threat thereof makes it necessary to call the National Guard into federal service the states would be left without militia to handle possible emergencies unless special provision of some kind were made, and in the year mentioned almost the entire National Guard having been placed in federal cantonments for intensive training Congress amended the existing National Defense Act to permit any state desiring to do so to organize special militia units for the duration of the emergency, with assistance from the national government in providing necessary equipment Nearly all states took advantage of the authority conferred, and throughout World War II the resulting State Guard contingents not only stood ready to be employed by the governor in the event of domestic disorder or disaster, but furnished protection as needed for power plants waterworks, docks, air ports, and other defense properties and installations against sabotage and possible attack With National Guard units again called into federal service (or likely to be) after the outbreak of hostilities in Korea in 1950 New York, Illinois, and other states reactivated State Guard units which in most cases had fallen into disuse

## 5 PUBLIC ASSISTANCE

Basic state responsibility

Education, health, transportation and safety are services or benefits for all of the people, without regard to social station or economic condition Every state nowadays, however, has to concern itself with categories or groups of its population requiring services of special character—the poor, the aged, the wayward, the physically handicapped, the mentally defective the blind, the disadvantaged child—in short, elements which, in addition to all else, stand in need of publicly provided *personal* assistance Except at a few points, the federal government left this broad field practically untouched until the depres sion of the thirties Then, however, it was compelled to come to the assistance of the states with vast sums for providing the unemployed with at least a subsistence level of income, and in the Social Security Act of 1935 it not only launched its own present nationwide program of old age and survivors' insur-

have borne a greatly changed aspect, with the federal government deeply involved in planning, financing, and supervising Responsibility, nevertheless, is

still primarily state and local the federal government merely guides and assists in certain fields, and many people needing attention but falling outside of the federal state program (even as expanded in later years) are no less dependent upon state-local beneficence than before

Forms of state activity

1 Poor relief

Care of the poor in a given community, whether entirely through private philanthropy or with the aid of taxes, long was considered an obligation of that community alone, and although most states now give some financial assistance, the function still is distinctly local, with in most states the county as the administering unit, but in New England the town and in a few other states the township or some county-township combination Under operation of the federal Social Security Act, numerous inmates were enabled to leave almshouses, and a good many of the institutions were closed The exodus however, was less general than anticipated, and the county or township (occasionally municipal) "poor house," "poor farm," "infirmary," or 'home for the aged and infirm" continues a landmark in most parts of the country

2 Federal state aid for special groups

Scattered, haphazard, and inadequate provisions by states and localities for such groups as the needy aged, the needy blind, the totally disabled, and dependent children have, under the federal Social Security Act, been replaced by well considered programs, administered by state authorities, but according to standards fixed federally and under supervision by the Social Security Administration calculated to insure that the objects for which federal money is turned over to the states are attained In nearly every state, such federal-state social security services are operated by a welfare or similar department, with responsibility often divided between a board or commission and a commissioner, director, or other executive officer, and operating in conjunction usually with county (perhaps also municipal) welfare departments

3 Institutional care

As early as the middle of the nineteenth century, it became apparent that counties and other local units could not be relied upon alone to provide for multiplying numbers of people needing institutional care, and as a result legislatures began setting up state institutions to supplement (in some cases to supplant) county and other local asylums and the like Today, every state has a number of such establishments, the most common being those for the insane, the feeble-minded, the blind, and the deaf and dumb, but including also reformatories, soldiers' homes, homes for soldiers' widows and orphans, and even occasional state almshouses Moreover, whereas formerly objectives hardly extended beyond providing shelter, food, and medical care, emphasis is now widely given to physical and mental restoration, appropriate forms of education, and general rehabilitation, with institutions having a penal aspect (*e g* , reformatories) given a greater slant in the direction of welfare

In most states, these miscellaneous and usually scattered institutions originally had their own separate boards of trustees or directors, with little supervision from the center The plan, however, was faulty, and while a few states cling to it, the great majority now have some central agency such as (a) a full-time, salaried board of control with full authority over all, or substantially all, of the institutions, (b) a group of such boards each with jurisdiction of a given type, *e g* , insane asylums, or (c) one or more advisory,

part-time, non-salaried boards for giving the managing officials of different institutions advice, criticism, and suggestions The third device, however, is disappearing, for in state after state legislatures are finding efficiency and economy attainable only through centralized administration by a full powered board of control

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# CHAPTER 41

## State Finances

Importance

In earlier and simpler times, state governments spent comparatively little, usually obtained funds with no great difficulty, and seldom were in debt But those days are gone forever Activities have increased many fold, new services demanded by the people add to the number almost yearly, with the dollar cheapened, the cost of labor and materials has soared, school, highway, and other aids to local units have tripled within a decade Uncommon nowadays is the legislature which does not at every session have to give its best efforts to deciding what expenditures to authorize, how to raise more revenue whether to borrow and how much, and how to keep local governments solvent without bankrupting the state The very heart of state government has come to be finance

Limitations on state financial independence

Nor are the states in as strong a position to cope with this situation as might be imagined Constitutionally, it is true, the federal system permits them a great deal of leeway Under their reserved powers, they can tax almost anything except federal property and income from federal securities, spend for at least as many purposes as the national government, and borrow at will Practically, however, there are limitations For reasons of prudence, most states have tied their own hands with constitutional provisions severely restricting borrowing and even in some instances forbidding it altogether And nearly everything of importance, except general property, which states undertake to tax—incomes, inheritances, gifts, motor fuel, liquor, tobacco, cosmetics, amusements, and what not—is found already taxed, perhaps heavily, by the federal government, leaving the states but limited elbow room Urgently needing more tax revenue, all for a good while, indeed, have been obliged to watch the federal government steadily moving in on them with tax programs and rates siphoning off very large parts of what the people can afford to pay for government s support [1]

In the foreseeable future, furthermore, no more favorable situation can be envisaged Federal activities and commitments promise to grow still more costly, federal pressures for tax money still more rigorous, state and local areas of fiscal freedom still more circumscribed In terms of expendable funds, the balance may be, and to a considerable extent already is, redressed by

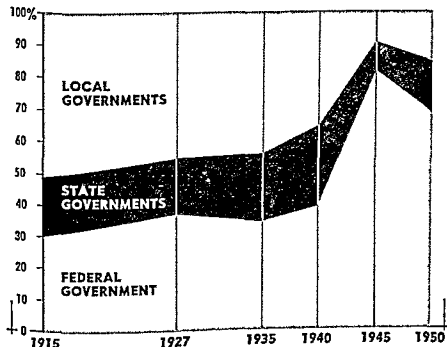
[1] Seven tenths of all taxes paid in fiscal 1949 ($53 6 billion) went to the federal government

multiplied and augmented federal grants in aid, totaling $1 96 billion in 1950 But grants in aid are supported by tax money which the states otherwise might raise for themselves, certainly they do not contribute to state and local financial independence, and more than one student of intergovernmental relations is urging that current trends be reversed by giving state and local governments exclusive access to more tax sources and in this way discouraging the habit of depending on the federal treasury for 'hand outs"

## THE PATTERN OF STATE EXPENDITURES

General growth

The past 50 years have seen governmental costs rise sharply on all levels, and today local governments are spending approximately seven times, state governments 60 times, and the federal government 80 or 90 times, as much a year as at the turn of the century On the state level, expenditure (exclusive of debt retirement, but including money turned over by state treasuries to be expended by counties, cities, and other local units) was then at the now almost inconceivably low point of less than $200 million a year, in 1915, it still was under $500 million On the other hand even before the depression decade of the thirties it reached $2 5 billion, and the impact of that experience brought it (in fiscal 1939) to $5 billion With labor and other shortages



practically stopping capital outlays except for federal purposes World War II slowed up further increase, although not until after a figure of almost $6 billion was reached in 1943, and when restrictions were relaxed the trend was so sharply resumed that a 1946 total of some $6 billion was pushed by 1948 to $10 billion and by 1950 to $13 2 billion

Figures for 1950

Some idea of how the 1950 total (including debt retirement and service) was allocated may be obtained from the following tabulation [1a]

STATE EXPENDITURES IN FISCAL 1950
(in millions)

| | | |
|---|---|---|
| Debt retirement | | $ 275 |
| Operation [2] | | 5 458 |
| Public welfare | $1 578 | |
| Schools | 829 | |
| Hospitals etc | 640 | |
| Highways | 567 | |
| Veterans bonus | 457 | |
| Natural resources | 315 | |
| General control | 310 | |
| Public safety | 242 | |
| Corrections | 148 | |
| Health | 126 | |
| Miscellaneous | 246 | |
| Capital outlay | | 2 112 |
| Highways | 1 438 | |
| Schools | 265 | |
| Miscellaneous | 409 | |
| Aids to local governments | | 4 011 |
| Schools | 1 982 | |
| Public welfare | 773 | |
| Highways | 576 | |
| Miscellaneous | 680 | |
| Interest | | 88 |
| Contributions to trust funds and enterprises | | 1 239 |
| Unemployment trust funds | 1 028[3] | |
| | Total | $13 183 |

Some basic features

No one who has read even the slight sketch of state functions and services presented in the preceding chapter will fail to recognize both the reasons for the expansion of state expenditures in recent decades and the particular forms of expenditure chiefly responsible for what has happened and the facts need not be reiterated save to emphasize (1) that the cost of running the state governments ( general control as termed by the Census Bureau in its tabulations) is but a small factor, (2) that the big central items of expenditure are services rendered to the people, with few significant avenues open for economy or retrenchment except at the expense of such services, (3) that three great services alone—education, welfare, and highways—account for more than

[1a] Compiled from Bureau of the Census *Summary of State Government Finances in 1950* (Washington D C 1951) 5

[2] Direct performance of governmental functions

[3] For completeness of the record this item may be included here for although under terms of the Social Security Act of 1935 the money comes from an excise levied by the federal government on employers and does not go into the state treasuries it is or may be requisitioned from the federal government by the states and paid out by them

half of the average state's outlays in any given year, and (4) that in the main the funds devoted to these purposes (and a number of others) are spent, not by the states directly, but by supervised local authorities to whom the money is allocated as subsidies or grants in aid

## METHODS OF APPROPRIATION—BUDGET SYSTEMS

Earlier looseness

Under conditions prevailing in practically every state prior to about 1913 (and even yet not wholly corrected), it was impossible either to make comprehensive plans for the distribution of public revenues among the state's direct activities and state-aided local enterprises or to achieve any strict and effective control over the use of state money or property With demands often pouring in from scores of state agencies and institutions, and with no method of balancing claims upon the treasury against one another, and of distributing appropriations on the basis of a full consideration of the state's requirements, unseemly scrambles for funds invariably took place whenever the legislature came into session The departmental and institutional estimates were either merely "compiled" by some officer such as the treasurer or auditor, and transmitted by him to the legislature, or presented directly and independently to the appropriation committees by heads of departments and institutions themselves No administrative officer acquainted with the entire business of the state reviewed such estimates, compared them, cut them down to actual necessities, measured them against estimated revenues, and laid before the legislature a carefully prepared financial program Furthermore, every member of the legislature was at liberty to introduce as many bills as he chose carrying charges upon the treasury, and when the legislature adjourned, no one pretended to know, even approximately, how much money had been appropriated Meanwhile, without any knowledge of what the total of authorized expenditures for the next fiscal period would be when the governor had finished vetoing bills and items, the legislature would pass revenue measures prepared by separate committees with little or no relation to the work of the committees in charge of appropriations Naturally, neither the governor nor the legislature could be held definitely accountable for what happened, and much extravagance and waste resulted [4]

Present budget systems

As the cost of government mounted, relief from these conditions became imperative, and in varying degrees it has been found in budget systems introduced by statute, or in a few instances by constitutional amendment, in all of the states since Wisconsin and California led the way in 1911—a full decade before such a system was adopted for the federal government In contrast with the loose procedures previously prevailing, under a budget system careful estimates of expenditures and revenues during a given period are worked into a single document and presented to the legislature as a coherent plan If the legislature meets biennially, the period is two years, otherwise, one year

[4] In states (all but nine) in which the governor could veto items in appropriation bills a familiar trick was to shield dubious outlays by including them in the same items with essential ones

**1. The budget-making authority**

Preparation of a state budget is a large and difficult task, and for undertaking it in various states, three types of budget-making authorities are found. (1) In one state, Arkansas, the budget is "legislative," i.e., prepared and submitted to the legislature by a joint budget committee of the two houses. (2) Seven states[5] have budgetary boards or commissions, consisting usually of the governor and one or two other executive officers and a few members of the legislature, or made up solely of the principal executive officers. (3) The remaining 40 states have what is called the executive type of budget,[6] placing responsibility for formulating fiscal programs directly upon the governor, although usually providing him with a budget bureau or division, or other staff agency, to perform the actual work under his supervision. Concentrating responsibility in the executive officer best situated to be informed on the financial needs of all branches of the state government, the executive plan generally is regarded as best, and it is now found not only in most states but in many local governments.

**2. Preparation and contents of budgets**

Budget making invariably starts with a request upon all spending agencies some weeks, or even months, before the legislature convenes for estimates of their financial needs during the fiscal period to be provided for. These received, prolonged and intensive weighing of them follows, interspersed with conferences with agency heads and others, sometimes supplemented with hearings and investigations. Estimates of income and appraisal of the state's general financial position also must be undertaken, and eventually a pattern emerges which can be translated into terms of a formal budget for legislative consideration. Most of the resulting document—often as many as 400 or 500 pages—will be taken up with a comprehensive financial plan, statistically presented, for the biennium or other period. But in it, too, will always be found a briefer summary and a budget message offering non-technical explanations and comments. Sometimes, also, there will be texts of bills for carrying the budget into effect.

**3. Legislative consideration**

Budgetary proposals are, of course, only a blueprint until the legislature acts upon them, and often the major portion of a session is consumed in taking such action. In three or four states, the legislature's hands are tied by rules permitting striking out or reducing appropriation items, but forbidding increases or insertion of new items. Everywhere else, however, there is full freedom, and not only may the budget-making agency's recommendations for raising revenue or for borrowing be flouted, but proposed appropriations may be inflated, curtailed, or even withheld entirely, especially if the governor's party is not in control of the legislative branch. Each house usually has separate appropriation and revenue committees to which budget proposals (and budget bills, if any) are referred, and measures for consideration on the floor emanate from these groups, ordinarily in the first instance from those in the lower house. Much would be gained in most states from joint, rather than separate, appropriation and revenue committees, and still more concentra-

[5] Delaware, Florida, Montana, North Dakota, South Dakota, Texas, and West Virginia.
[6] New Hampshire and Rhode Island are included here, although their budget systems show important variations from the true executive type.

tion of responsibility would result if a single joint finance committee were substituted for the four separate committees now commonly found Appropriations as voted may be lump sum with each spending agency receiving a flat amount to be allocated for various purposes by the agency s chief officer, or they may be itemized or segregated with allocations made in the appropriation act itself The first system promotes administrative flexibility which up to a point is advantageous the second makes for more careful planning which however may result in excessive rigidity The second system also puts more teeth into the power of vetoing appropriation items possessed by the governor in all but nine states

## SOURCES OF STATE REVENUE

Like the national government states derive revenue not only from taxes but from other sources as well yielding usually in these days from a fifth to a fourth of total income (in fiscal 1950—ending at various dates in different states—$2 9 billion out of a total of $11 9) Chief among state revenues not arising from state taxation are

1 Non tax sources

1 Earnings of public service enterprises established and carried on by the state such as docks wharves warehouses ferr es toll bridges canals mills and elevators coal mines publishing houses and irrigation projects Closely related are the profits of state liquor dispensaries—usually the largest item of all in states employing the public liquor store system

2 Fees or highway privilege dues collected from individuals or corporat ons enjoying special rights to use the streets and roads of the state in providing public services such as those furnished by electric railway lighting telephone and water companies

3 Receipts from rental of real estate held principally or wholly for investment purposes such as the income from school lands in certain Western states

4 Interest received on sinking funds public trust funds and current deposits of state money in banks

5 [illegible]
tion [illegible]
filing [illegible]
state educational institutions fees for the care of inmates of asylums and the like and sometimes also the earnings of industries carried on in penal or charitable institut ons

[illegible]

donations or gifts from private persons or corporations the principal or income of which can be expended for designated state uses and contributions by state employees toward pension or retirement funds

8 Special assessments and charges to defray the cost of specific publ c improvements or public services undertaken primarily in the interest of all or some portion of the public such as for the cost of highway construct on and repair for forest fire patrol for the maintenance of drainage d stricts and for other improve

[7] In a sense such grants are not non tax revenues for of course the funds involved have been raised by taxat on—*fede al* taxat on however rather than state

ments and services assessed against the benefited properties or persons Such assessments, however, are employed less extensively by states than by their local subdivisions, especially cities

2 Principal taxes employed

Significant, however, as are the sums annually accruing in many states from these varied sources, by far the largest amount of revenue in all states—rarely less than four fifths of the total—is derived from taxation, and this form of income requires fuller attention here In general a state has a right to tax all persons and corporations residing or doing business within its bounds, and all forms of property located therein—save only as restricted by the federal constitution [8] and by self imposed restraints laid down in the constitution of the state itself, and a tabulation of taxes employed today (not all of them in any one state, but in terms of total yields in fiscal 1950) would look as follows

STATE TAX YIELDS IN 1950 [9]
(in millions)

| | | |
|---|---|---|
| Sales and gross receipts | | $4 670 |
| General sales or gross receipts | $1 670 | |
| Motor vehicle fuels | 1 544 | |
| Alcoholic beverages | 420 | |
| Tobacco products | 414 | |
| Miscellaneous | 622 | |
| Incomes | | 1,310 |
| Individual | 724 | |
| Corporation | 586 | |
| License and privilege | | 1,203 |
| Motor vehicles and operators | 756 | |
| Miscellaneous | 447 | |
| Unemployment compensation [10] | | 1 028 |
| Property | | 311 |
| Miscellaneous [11] | | 418 |
| | Total | $8 940 |

The changed emphasis in state taxation

Through a decade and a half ending June 30, 1950 total state tax collections mounted from year to year without interruption, reaching in fiscal 1950, as shown, the sum of $8 9 billion—7 per cent above the preceding year and establishing a new record The striking thing about the recent tax picture is, however, not so much the impressive aggregate yield as the great change that has taken place in the relative importance of different imposts, and the top most fact in this connection is that while the general property tax—long the principal resource—remains the backbone of our revenue system for purposes of *local* government, it has receded far into the background as a support for state government proper While in 1949 sales, gross receipts, and use taxes of various kinds (including motor fuel, liquor, and tobacco taxes) were yielding

[illegible] 1951) 5
[10] See p 644 note 3 above
[11] Death gift severance poll and other taxes

the states the huge sum of $4 670 billion, or 52 2 per cent of all state tax-revenue, the general property tax was yielding for purely state purposes no more than $311 million, or only 3 4 per cent Indeed, almost half of the states, including New York, Pennsylvania, Illinois, and California, no longer make any use of the *general* property tax at all for *state* purposes, although in some instances retaining *selective* taxes on certain types of property such as all personal property or merely intangibles or public utilities

Because, nevertheless, of its past importance as a state tax, its continued use widely for state and everywhere for local purposes, the prevalent dissatisfaction with it in many quarters, and its central position in the entire problem of tax reform, our summary of the existing tax system well may start with some comment on the property tax [12]

## THE GENERAL PROPERTY TAX

Nature and basis

In its broadest meaning, the general property tax is a tax on the estimated exchange value of property, levied at a common rate for all property in the same taxing area It is thus universal and uniform, it is imposed on the property where it is located, and it is paid by the owner [13] Taking, of course, a multitude of forms, property nevertheless falls broadly into two categories, *i e*, (1) real estate, consisting of land, buildings, and permanent fixtures, and (2) personal property—the one immovable, the other movable Personal property, in turn, may be either tangible, *e g* livestock, grain merchandise, household furniture, machinery, and automobiles, or intangible, as stocks, bonds, promissory notes, mortgages and bank deposits Where the general property tax is really general, these distinctions are, at least in theory, of no great significance, all property of equal value is supposed to pay the same tax regardless of classification In the majority of states, however, some categories of property are set apart for special (usually lower) rates of taxation, or indeed are exempted altogether, so that the term "general property tax" often must be taken in an approximate rather than a strictly literal sense In all states, the tax is employed primarily for county, city, and other local purposes, being, indeed, by far the greatest resource of local governments, and, as indicated above, numerous states now make little or no use of it for strictly state purposes In all cases, however, it rests upon taxing authority conferred by the

The "tax calendar"

state, the stages or steps involved in administering the property tax—the "tax calendar" of which the experts speak—lend themselves to brief review (1) First comes the tax levy, the competent authority (usually the legislative body) of each unit of government, including the state itself where

... on that direct taxes shall be apport...

sharing in the proceeds, determining the amount of revenue that must be raised from this source and then imposing it as the year's tax burden, so to speak, on the property concerned [14] (2) The property is appraised by local (county, township, or city) assessors in order to determine the valuation on which the owners' tax obligations shall be computed Personal property is assessed annually, real estate also annually in about half of the states, but in other states at longer intervals ranging from two to four years, and all assessments are supposed to indicate value on a certain day (3) Valuations determined by local assessors are far from uniform, and property-owners often raise objections Hence a third step involves inspection of the assessments, with adjustment of inequalities and injustices, by a county, city, or township board of review

(4) A fourth step is "central assessment or equalization" Along with the locality, the county, and in most instances the state, makes a property tax levy Each taxing jurisdiction might, of course, set up its own separate assessment machinery But this would involve expensive duplication, and what happens is that each takes the locally-made assessments as a starting point and on the basis of them makes such equalizations and other adjustments as boards of equalization employed for the purpose may decide upon Sometimes the work is performed on the state level by a board of equalization consisting of certain elective state officers serving *ex officiis* but often it is in the hands of a specially appointed body known as the tax commission, which in any event is likely to have the important functions of (a) issuing instructions to assessors and other tax officials regarding the proper performance of their duties, including methods of procedure, accounting and recording, and (b) making the original assessments of certain kinds of property which are difficult to assess locally, especially railroads, telegraph and telephone systems, express and sleeping-car services and other public utilities Incidentally, it would, of course, be perfectly possible to let the state do *all* of the assessing, and this would make for considerably greater uniformity than even assiduous equalization authorities can hope to achieve Local assessors, however, are supposed to have the advantage of familiarity with local property, and, although overborne with respect to many other forms of centralization, local jealousy of state authority would at this point be difficult to break down

(5) Once the results of assessment and equalization, the state over, are known, taxes can be apportioned and rates determined In the city, township, or other local assessment district, the clerk or other proper official has only to figure out how many cents on the dollar, or dollars on the hundred will be necessary to produce the revenue required locally From the county will come similar information for purposes of county revenue, and finally also from the state for its purposes, except, of course, where the state no longer shares in the proceeds of the tax Adding to the local rate the rates certified to him by the overlying units, the local official arrives at the total tax-rate, and tax bills are made out and sent to property-owners accordingly

[14] Chronologically, the levy often comes later, but this is immaterial to the essential process.

Completing the tax calendar are three further stages which for present purposes need only be mentioned (6) collection of the taxes as levied, commonly by a local collector or treasurer, who forwards the county and state shares to the proper officials, (7) efforts to collect taxes that become delinquent, and (8) appeals from dissatisfied taxpayers or tax districts, first to the state tax commission, and afterwards, if desired, to the courts The appeal may go directly to the courts in many instances

Advantages of the tax

For 100 years, the general property tax has been a cardinal feature of the American fiscal system, and notwithstanding its many and serious faults, there are points in its favor Property receives protection from government, and may logically be required to contribute to government s support Lending itself particularly well to local use, the tax is in keeping with the perhaps weakening, but still persisting, spirit of home rule Its easy elasticity—the facility with which its yield can be moved up or down by simple manipulation of the tax rate—fits it to meet varying needs after other sources of income have been exhausted

Disadvantages

1 Concealment of personal property

Nevertheless, the tax has serious defects First may be mentioned the unfairness arising from widespread concealment of intangible personal property, resulting in complete escape from taxation In early times, nearly all property was in the form of real estate or of tangibles such as livestock, furniture, merchandise, farm implements, and grain Nearly everything could be located and its value determined by the tax assessor, and little, if any, taxable property failed to pay its just share From this relatively simple situation, we have shifted to one in which the value of stocks, bonds mortgages, bank deposits, and other intangibles often exceeds that of real estate and tangibles Furthermore, it has become practically impossible for tax assessors actually to see and evaluate all tangible personal property, to say nothing of intangibles, so that the common practice is to require the taxpayers themselves to make out sworn statements of their personal property and simply hand them to the assessors—a method which of course, virtually amounts to self assessment Still further, while real estate and personal tangibles are usually immune from federal taxation, intangibles (or at all events the income derived from them) are taxed so heavily from Washington that when federal taxes and state taxes are added together, they amount—at least in the estimation of many people—to virtual confiscation Under these circumstances, much property which the tax assessor has no chance to see is never reported to him—the proportion in any given case naturally depending upon the personal honesty of the taxpayer

2 Defective assessments

A second main defect of the general property tax is faulty assessments The reasons for the deficiency are numerous, but doubtless the chief one is that 90 per cent or more of the 100,000 assessors functioning in some 29,000 assessment districts throughout the country are part time elective officials, with hardly ever any training qualifying them to weigh the many factors entering into the determination of property values, 'much of what they do is mere guess work" There are architects' tables, land value maps, and other equipment which would be of assistance, but only rarely are they used

Directions from the state tax commission and readjustments made by equalization boards help considerably, but not enough to assure satisfactory results In the outcome, what purports to be a uniform general property tax is in many states neither uniform nor general, and of course not equitable Real property usually bears more than its fair share, and often there is glaring inequality in the valuations placed upon real estate located in different parts of the same state and even within the same county Personal property, on the other hand either is shockingly under valued, or because of being easily concealed, escapes taxation altogether

Modes of improvement

1 Classification for tax purposes

Problems connected with these and other defects of the property tax have received much study, and in a good many states improvements, although certainly not full solutions, have resulted Most important among changes undertaken has been the abandonment of constitutional or other requirements of uniformity, in order that property may be thrown into different classes for taxation at different rates Approximately two thirds of the states, indeed, have adopted classification in principle, and in half or more some classification has been carried out Here and there, as in Minnesota, classification has been sufficiently extensive to admit of quite a number of rate levels In most instances, however, it has not gone beyond differentiating intangibles from tangibles, on the theory that lower rates on the former will lessen the incentive for concealing them and draw them out of hiding Gains have resulted, but not as large as anticipated

2 Appointive assessors and reviewers

Improvement would result also from replacing untrained part-time, popularly elected local assessors by assessors appointed, or at least nominated, on a merit basis by the tax commission or other central authority, and rated as *state* civil servants In most local communities, the idea hardly would be looked upon with favor Nevertheless, Iowa has adopted it in essence, and Illinois would have done so but for obstacles raised by the courts The plan, too, well might be applied to county and other boards of review or equalization, now commonly composed of members serving *ex officus* and hardly better equipped than the assessors themselves

3 Reduced exemptions

Still another step in advance would be to place on the tax-rolls a great deal of real estate now exempted—in all, nearly one sixth throughout the country as a whole Real estate used for religious, educational, and philanthropic purposes long has been immune, on the ground that the institutions owning it are run, not for profit, but for performing essential community services Presumably this is justifiable But some states go farther—for example, by partly or entirely exempting property of veterans, manufacturing plants, farm implements, growing crops, and (in more than a dozen instances) homesteads, *i e*, urban or rural dwellings occupied by the owner, with the sites on which they stand All such exemptions narrow the tax base and increase the tax rates on remaining taxable property, and, with heavy pressure for augmented public revenues promising to continue through the years, we are likely to see determined and finally successful effort to bring on the tax rolls much property now exempted, even though perhaps at reduced rates or valuations

## PRINCIPAL STATE TAXES TODAY

From the general list of state taxes given above, four or five may be singled out for brief comment

1 General sales and use taxes

State as well as federal taxes on sales of particular commodities, *e g*, liquor, tobacco, and motor fuel, long have been familiar Desperate fiscal needs during the depression of the thirties led one state after another, however, to carry the principle farther by instituting *general* sales taxes as distinguished from mere selective levies, and in terms of yield such taxes (along with related gross receipts and use taxes) have now taken top place in the over all state tax picture Beginning with West Virginia in 1921—somewhat before the depression—a total of 38 states introduced the general sales tax in one form or another, most of them between 1933 and 1936 In some instances, the step was inspired at least partly, by fear of inability, in the lack of such a tax, to meet the obligations imposed by the new social security system at a time when state revenues were sagging In most cases, indeed, the tax was adopted as a supposedly temporary or emergency measure, and in view of its unpopularity because of its inherent troublesomeness and its "regressive" character in bearing with greatest proportional weight upon consumers least able to pay (the burden being almost invariably shifted by the seller to the buyer), it is not surprising that only five states have adopted such a tax since 1937 or that eight have abandoned it Thirty states, located in all sections of the country, retain it, however,—usually for retail sales only, and most commonly at a rate of two per cent, but in some instances for sales by manufacturers and wholesalers as well,[15] and in 16 of the number a compensating "use" tax is laid on the use, storage, or consumption of commodities that would have been subject to the sales tax if bought in the state instead of brought in from outside Wherever tried, the sales tax has been highly productive (the largest source of state income in 23 states in 1950), and it is difficult to see how some states could have avoided bankruptcy without it

Whether as a matter of social policy, it is justifiable thus to deflect tax burdens from property and incomes to the mass of the people as consumers may be, and is, warmly debated But in some states, *e g*, Ohio, the impact is softened by exempting food and other necessities, and in any event, urgency for revenue seems likely to continue in many states to overbear all scruples on the point

2 Income taxes

The first significant chapter in the history of income taxation in this country was written on the federal level (starting in 1861), and culminated in the Sixteenth Amendment and the income tax law of 1913 In the states, there were a few earlier unsatisfactory experiments, but the first permanent and effective law was passed in Wisconsin in 1911 Two years later, Massachusetts, Delaware, Missouri, and Mississippi enacted similar legislation, in 1915,

[15] Sales taxes are employed too by New York City, New Orleans and a good many other municipalities including 141 in California (as of January 1, 1951)

New York and North Dakota joined the growing list, and thereafter the movement spread until at present (1951) 33 states tax corporate incomes and 31 employ some sort of tax on individual earnings In fiscal 1950, such taxes produced nearly 14 7 per cent of the total state tax yield (naturally a higher proportion in states having the tax)

Though differing in details from state to state, the principal features of the tax are (1) taxation of net income only,[16] (2) exemption of specified amounts (usually from $500 to $1,000) for single persons and of larger amounts (commonly $2,000 or $2,500) for married couples, with allowances ranging from $200 to $400 for dependents, (3) a scale of rates rising from commonly 1 per cent on the first $1,000 of taxable personal income to usually 5, 6 or 7—but in a few instances as high as 10 and in North Dakota even 15—per cent in the highest bracket, (4) a "normal" rate sometimes supplemented by surtaxes (general or for specific purposes such as education) after a certain point is reached, (5) usually a flat, but sometimes a progressive, rate on incomes of corporations, and frequently (6) assessment and collection, not by local officials, but—as started in Wisconsin in 1911—through the state tax commission and a force of civil service employees In the state as in the federal field, the graduated, or progressive, income tax is widely regarded as the most equitable tax form In these days however, it yields less than general sales taxes—less even than motor fuel taxes alone, and possibility of realizing more from it is sharply restricted by the extremely heavy taxation of both personal and corporate incomes by the federal government[17]

**3 Motor fuel and vehicle taxes**

Until comparatively recent times highways and streets were financed almost entirely from general taxation, mainly the property tax The advent of the motor vehicle to almost universal use led, however, to demand for more and better roads, and naturally prompted the idea that the highways, rural and urban, used by the insatiable motorist should be paid for and kept up by him The result has been, not only the development of the country's present remarkable network of hard-surfaced thoroughfares, but the rise to great prominence of a newer group of tax levies, essentially in the nature of privilege or service charges, and often referred to as the "motor vehicle tax family" Chief among the members of this family are (1) the motor vehicle license, in essence an annual charge for the privilege of operating a motor vehicle on the highways, and yielding in 1950 more than state income taxes paid by either individuals or corporations, and (2) the motor fuel tax, starting in Oregon in 1919, now employed in every state, and in 1950 producing (at rates averaging four or five cents a gallon) more than 17 per cent of the entire state tax revenue of the country—in 16 states more than any other tax Over the protest of rural and road-building interests, not to mention automobile associations, varying portions of motor vehicle and motor fuel proceeds have, in later years, been diverted, in two-thirds of the states, to education, welfare, and other state purposes, notwithstanding that, even without such

y gross receipts

taxes now are

diversion, proceeds throughout the country as a whole would at no time have sufficed (except during wartime suspension of construction) to meet the full outlay of the states on roads and streets Both motor vehicle and motor fuel taxes have the great merits of being highly productive and easy to administer

4 Liquor and tobacco taxes

Prior to the prohibition era under the Eighteenth Amendment, the states, while levying license charges in connection with the liquor traffic, left all excise taxation of liquor to the federal government Subsequently, however, they, too, entered the field, and in 1950 receipts from this source amounted to almost two thirds as much as from personal income taxes In 29 states where the traffic is carried on under license as a private business, there is income also from wholesale and retail licenses, while in 16 where the traffic is a state monopoly, income from licenses is replaced by profits from the operation of dispensaries Like excises on liquor, taxes on tobacco and tobacco products represent a more recently developed source of state revenue, as in the case of liquor, also, dealers usually are licensed and the commodity itself taxed Nearly all states tax cigarettes (most commonly at about three cents a package), and several tax tobacco also in other forms Notwithstanding that, like liquor, tobacco is subject also to heavy federal taxation (at present, cigarettes at eight cents a package), a yield of $414 million was realized in 1950, and both taxes are looked upon favorably by most people as not falling upon necessities—although sometimes viewed also as regressive in the sense of bearing hardest upon people of slender means

## TAX ADMINISTRATION—THE COLLECTION AND CUSTODY OF FUNDS

Tax collection

In times when nearly all state revenue was derived from the general property tax, the state treasurer had little to do except receive the moneys passed along to him after being locally collected Nowadays, the situation is different, because the taxes on which the state depends have become highly diversified, and many are collected by officers or other representatives of the state itself To be sure, the general property tax is in nearly all instances still gathered by local collectors or treasurers, county or city, with the proceeds apportioned among the various taxing units according to the different rates that have been imposed As previously explained, in many states this tax, however, no longer is used for state purposes, and in nearly all of the others its yield to the state is slight

Local vs central collection

Except as normally proceeding almost automatically in the case of the general property tax, local collection of state revenue is not economical, the expense entailed often consuming a large share of the sums gathered Centralized collection therefore has grown in favor, especially in connection with income, estate, inheritance, motor vehicle, and other taxes on which states really subsist In Wisconsin, taxes on incomes are collected by income tax assessors, selected according to merit principles and each functioning in one of four districts, where duties are performed under direction of the state tax commissioner, and with property tax procedures further reversed in that a

large share (60 per cent) of the proceeds of the income tax, after being centrally collected, is turned over to counties and cities. All other states employing income taxes have substantially similar arrangements, at least for collection.[18]

Tax revenues gathered by state agencies and retained for the state do not always, however, go into the general state treasury; fees collected by the secretary of state or the insurance commissioner, for example, frequently are used to pay the expenses of the office collecting them, only the surplus, if any, being turned over to the treasury. Even the moneys paid directly into the treasury are in some instances earmarked for particular purposes, *e.g.* education, making it necessary for the treasurer to maintain an accounting system permitting of separate accounts for various funds. Among experienced persons, sentiment is growing in favor of concentrating all state tax administration in the state tax commission or some other single department.[19]

The care of funds

In about a dozen states, all state funds are kept in the state's vaults, with, of course, no interest received. Elsewhere the practice is to deposit such money in banks located in different parts of the state and designated as depositories. Manifestly the latter plan opens a way for favoritism and collusion in selecting the banks, and for losses arising from bank failures. After unhappy experiences at these points, most states, however, have protected themselves, at least against loss, by requiring depository banks to furnish adequate guarantees of security, and some profit to the state usually accrues from interest at a modest rate on deposits made.

## STATE CONTROL OVER LOCAL FINANCES

As must have become apparent, the finances of a state and of its political subdivisions are so intermingled that neither can be understood apart from the other. For the ordinary taxpayer, the finances of his local governments (there are almost always more than one) are, indeed, considerably more important than those of his state; such governments, in the aggregate, spend three or four times as much as do the 48 state governments combined. These local governments, however, raise by no means all of this money by their own efforts, and this leads, first of all, to a word about the sources from which local revenues are derived.

Sources of local revenues

1. Local taxes

First among these (mentioning only the most important) is locally imposed taxes, supplemented by many kinds of license and other fees.[20] On this matter, little need be said, for the one universally employed and chiefly important local

[18] Some 12 states share the proceeds of income taxes with local governments, and the same is true of inheritance taxes.

[19] Every state except Florida now has a tax commission or similar agency. About 20 states have a commission of from three to seven members (usually three), and some 13 others concentrate the functions in a single tax commissioner, sometimes with the assistance of a board of tax appeals. Under either plan, tax commissioners ... the governor

tax is the general property tax, already described The great bulk of the proceeds of this tax (in many states all) goes for local needs, and it is difficult to see how the tax, with all its faults, could be replaced by any other

2 Shared taxes

No tax of any kind can be levied locally except by authority of the state Next may be mentioned the proceeds of "shared taxes," *i e* taxes which, although imposed, and usually collected, by the state, are by law so administered that some agreed proportion of the yield is automatically turned over to counties and other local units Technically, the general property tax is not such a tax, because although the taxpayer gets a single tax bill, he really is paying, by a single transaction, two or more property taxes—county city, state—*included in one bill for purposes of convenience, a taxing unit on any* taxing level can put into the composite bill whatever levy it desires [21] The truly "shared' tax is *one* tax, state levied and with the locality having no part in it (besides paying it) except to receive such percentage of the yield as has been allocated to it by law Good examples in many states are motor vehicle license taxes and motor fuel taxes and in varying numbers of states, income taxes, liquor taxes, and general sales taxes

3 Grants in aid

Finally, there are grants in aid—extended even more generously by state governments to localities than by the national government to the states ($4 billion in 1950 compared with $2 billion) [22] These differ from shared taxes in that, whereas under the shared tax the state automatically hands over to the localities from year to year such proportion of the proceeds of a given tax as has been fixed by law under the grant in aid system the state, *out of general funds* bestows on the localities such sums, for such purposes, and on such conditions, as it may choose In one case the amount distributed is dependent on the yield of a particular tax and usually the distribution is such, at least approximately, as to return the money to the communities where it was collected In the other case, a fixed amount for a given year, from general funds, is distributed, by appropriation and commonly on some basis of demonstrated need Funds received by localities from shared taxes may usually be expended for any purposes whatsoever, but those from grants in aid only for purposes expressly indicated in the grant Both shared taxes and grants in aid have developed on their present large scale primarily because of (1) the declining capacity of the general property tax to carry the burden of growing local services and costs, and (2) the superior taxing powers of state governments as compared with local governments in other fields

Forms of state control

Even in imposing their own taxes (including the property tax), local units are likely to be subject to constitutional or statutory restrictions, *e g*, as to the maximum tax rate they may employ, and in any case, local assessments may come under the scrutiny of the state tax commission or other equalization agency, which may readjust them or even (usually on appeal from taxpayers) cause reassessments to be made In spending their funds, too, local governments are under state controls (1) Grants in aid are received on condition

[21] Except as restricted by general constitutional or statutory limitations
[22] It is not to be forgotten that the national government also makes *some* grants directly to local units although in relatively small amounts

that the services for which they are earmarked are kept on a satisfactory level of efficiency, and state authorities have a good deal to do with establishing such levels and, through inspection and direction, seeing that they are maintained (2) Local budgets often are subject to review by state officials, who may protest items which they consider excessive or otherwise unjustified Deficiency appropriations and transfers from one fund to another also may come under the critical eye of a state auditor, board of accounts, or other agency (3) Local finance officers often are required to use uniform systems of records and accounting, and in any event, in nearly all states, representatives of a state finance officer or department pay annual (usually unannounced) visits to spending officers of local governments, look over their accounts, require carelessness to be corrected, and cause embezzlers to be brought to justice (4) Debt limits commonly are imposed, and while borrowing within these limits usually may proceed without intervention from the outside a county board or city council proposing to issue bonds to build a highway, develop a park, or construct a court house or city hall may find a group of taxpayers arguing before a competent state authority that the outlay is unnecessary, extravagant, or ill advised at the particular time, and may be obliged to convince state examiners that the proposal is sound, on penalty of seeing it vetoed at the state capital

## STATE AND LOCAL DEBTS

State debt

A final phase of state and local finance is borrowing and indebtedness Unlike the national government, which can borrow without restraint the governments of all but three states (New Hampshire, Vermont, and Connecticut) are restricted by constitutional provisions designed to prevent a recurrence of the reckless piling up of debt to be laid at the door of many a state legislature before the Civil War and during the Reconstruction period Nevertheless, state indebtedness increased almost nine fold between 1912 and 1948, nowadays every state carries some debt, even though in the cases of Nebraska Idaho, Utah, and Nevada less than $1 million each, and notwithstanding debt retirement made possible in a number of states by increased revenues arising from wartime and postwar prosperity, the over-all of state debt reached a peak of $5 3 billion in 1950, compared with $4 billion a year earlier A redeeming feature of the situation, however, is that in many states a substantial portion of existing indebtedness is covered by sinking funds earmarked for debt redemption

Local debt

Debt burdens incurred by counties, cities, and other local units weighed heavily on taxpayers during the great depression, and in 1934 Congress came to the relief of embarrassed local governments by passing a Municipal Bankruptcy Act under which any of them unable to service their debts could voluntarily go into a bankruptcy court and get plans approved for readjusting their obligations [23] Moreover, after 1940 the wartime economic upsurge

[23] Declared unconstitutional by the Supreme Court in 1936 this measure was replaced by another in 1937 providing for somewhat different procedures and with the Court later fully assenting (United States v Bekins 304 U S 27, 1938)

enabled local governments of all kinds (except in the case of special districts [24]) to reduce indebtedness with such rapidity that by 1946 local obligations were down by $3 2 billion, or 17 2 per cent Unhappily however, 1947 saw the trend reversed, and on June 30 1950 the total of local debt stood at $18 3 billion—approximately $4 5 billion above that of only three years previously [25]

Method of borrowing

State and local governments borrow money ordinarily by issuing interest bearing bonds running for periods of from 10 to perhaps 20 years and taking the form of either sinking fund issues or serial issues Under the sinking fund system all bonds of a given issue mature at one time and a definite sum is set aside each year from current revenues to meet principal and interest in full when the date arrives Serial bonds on the other hand mature in instalments or series, thus enabling a definite proportion of a given debt to be extinguished every year, or at other stated intervals by payments from current revenues which under the other system would go into the sinking fund Serial bond issues have grown rapidly in popular favor in the past three decades, and are fast supplanting the earlier sinking fund system

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## CHAPTER 42

# The State Judiciary

**Functions**

Rounding out the government of every state is a system of courts providing means for (1) adjusting disputes between individuals, and between individuals and state or local governments (2) determining the guilt or innocence of persons accused of violating the state s criminal laws, (3) protecting the constitutional rights of individuals and corporations, (4) keeping the executive and legislative branches of government within the bounds fixed for them by the state constitution, and (5) promoting adjustments of sundry kinds, including the settlement of estates of deceased persons [1]

**Some general features**

**1 Scope**

Three cardinal features of these state courts require emphasis at the outset The "state judicial system' embraces not only tribunals operating on a state wide basis (of such, indeed there are few) but those functioning in counties, cities, and other local areas as well From justice of the peace and police court to supreme court all of the courts on all levels form parts of a single pattern, even though far less tightly integrated than they should be Contrary to a common popular impression, the state judicial system is in no way subordinate to the federal system the two sets of courts are separately rooted and mount through their successive grades on parallel lines, each with its own field of jurisdiction and operating independently within it Any case it is true, originating in a state court but involving determination of a right claimed under the national constitution laws, or treaties may be removed or carried on appeal to a proper federal court The great majority of cases coming before the state courts do not, however, raise any such federal question,' but involve simply on the criminal side the enforcement of state penal laws, and on the civil side, the adjudication of rights claimed under the state constitution the state statutes executive or administrative orders, charters or local ordinances, or the common law, and nearly all judicial actions started in a state court are completed there with just as much finality as if there were no federal courts at all

**2 Status**

**3 Jurisdiction**

While many suits may be instituted in either a state or federal court, and while the dockets of federal courts are nearly always crowded, the great bulk of judicial business the country over—probably nine tenths of it—is trans-

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acted in the courts of the states Under the principle of delegated powers the federal courts have only such jurisdiction as the national constitution expressly or by inference gives them, and in general are confined to administering federal law, under the principle of reserved powers, the state courts have everything else, the state law which they administer covering not only a wider and more indeterminate range of matters, but matters often peculiarly provocative of legislation, and consequently of litigation Much of the time, state courts and their decisions do not attract as much attention as those in the federal sphere Nevertheless, here it is, rather than in the federal courts, that most people, as plaintiffs, defendants jurors, or witnesses, have their contacts (if any) with the judicial process

## THE SYSTEM OF COURTS

Regulated partly by constitutions and partly by statutes court structures are precisely the same in hardly any two states Differences, however, rarely are very significant, and present purposes will be served by a single broad outline

1 The *lowest* courts

(a) Justices of the peace

On the lowest level stand purely local tribunals consisting of justices of the peace, municipal magistrates or other officers of similar grade Originally justices of the peace functioned in rural and urban areas alike, and some still are found in cities of considerable size The tendency, however, has been to displace them in urban centers by other magistrates, and today they are largely confined to rural communities, including smaller towns As a rule justices are chosen by popular vote in townships or other subdivisions of the county, and for short terms (usually two years), although in a few states they are appointed by the governor In any case their jurisdiction commonly extends throughout an entire county and includes both petty civil suits (involving up to perhaps $200 or $300) and breaches of the peace and other minor infractions of law Practically everywhere they also may issue warrants for the arrest of persons charged with more serious offenses, may hold preliminary hearings, and if the evidence warrants may bind over a suspect to await action by a grand jury or prosecutor In contrast with practically all other state and local courts, the justice courts have no official seal and no clerks, and no permanent official record of their proceedings is kept Accordingly, they are not "courts of record," as are the others Furthermore, they may render final decision in only the most petty misdemeanor and civil cases, in all others, appeal lies to the next higher court which, however, ordinarily will consider an appealed case *de novo,* without reference to what has taken place in the justice's court

(b) Municipal or police courts

In most incorporated places of appreciable size the functions elsewhere performed by justices of the peace are assigned to one or more minor tribunals variously known as municipal courts, police courts, or magistrates' courts, with jurisdiction naturally confined to the given municipality Unhappy experience with such tribunals, however, has led most large cities, *e g*, New York, Chicago, Philadelphia, Detroit, Boston, and Baltimore, to coordinate

and integrate all work of the kind in a single municipal court, even though *necessarily operating* in branches or sections dealing with cases of particular types

In many states, the next level above the justice and municipal courts is occupied by courts of general trial jurisdiction in which most *important litigation* originates and most persons accused of crime are tried In others, however, there are courts intermediate between these tribunals and the justices, organized on a county basis and with jurisdiction so defined that a plaintiff *may choose* whether to sue before an intermediate or some other court [2]

2 Intermediate courts

*Even where such* intermediate courts exist however, greater importance attaches to the courts of general trial jurisdiction on a somewhat higher *level* *In some* states, a tribunal of this grade is called the county or superior court, and *there* is a *single judge in each county* More often however, two or *three* counties are grouped for the purpose, with a district or circuit court serving *each* group, and with usually a single judge except in urban or other areas where the volume of work requires more In any event a trial court session *is held at least* once a year in practically every county either by the county court judge, or by a district or circuit judge making the rounds in accordance with a regular schedule, and it is in these court sittings that trial juries are most extensively employed [3] In 37 states all county district or circuit judges *are chosen* by popular vote and for terms *usually of four years On this level* and above, too, all judges may be assumed to be men of legal training

3 General trial (county, district or circuit) courts

(a) Organization

Whether held by a local county or superior judge or by a district or circuit judge making periodic visitations county courts regularly have both criminal and civil, and also both original and appellate jurisdiction On the criminal side, they handle practically all cases except those of a petty nature taken care of by the justices of the peace or magistrates or in an intermediate court, and ordinarily their decisions are final in so far as questions of fact are concerned, although if disputed matters of law are involved a case may usually be carried on appeal to a higher tribunal Jurisdiction in civil cases is commonly unlimited although in a few states restricted to actions involving less than $1,000, or some other stated amount and here again most cases receive their first hearing, although some are brought up on appeal from decisions of justices of the peace or magistrates In populous counties, the settlement of the estates of deceased persons and the performance of functions relating to the property, custody, and welfare of minor children and other persons under guardianship are in the hands of a separate probate, surrogate, or orphans' court Elsewhere, however, these duties commonly devolve upon the regular judges

(b) Jurisdiction

Above their general trial courts, and with a view to relieving congestion in the supreme court, about one fourth of the more populous states have placed one or more appellate courts, with judges sometimes appointed but usually elected from a few large judicial districts into which the state is

4 Appellate courts

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divided for the purpose,[4] and sitting in "benches" of three or more, with decisions reached by majority. Limited original jurisdiction occasionally is conferred by the legislature, but all, or practically all, of the time of these courts is devoted to hearing appeals from the general trial courts and rendering decisions which in many classes of cases are final. As a rule, only questions of law are involved, with juries therefore not employed.

5. Supreme courts

(a) Structure

The highest state court almost always is called the supreme court and usually consists of either five or seven justices (including a "chief justice") sitting together when hearing cases, although in at least one-third of the states it is permissible to sit in sections. In any event, a majority of the whole number of members of the court or section must concur in any decision rendered. The justices nearly always are elective, most often on a state-wide nonpartisan ticket, although in a few states by districts, and there are instances in which nominations are made in districts, but with election by the voters of the state at large. Varying all the way from two years in Vermont to 15 and 21 years in Maryland and Pennsylvania, respectively, and "good behavior" in Massachusetts, New Hampshire, and Rhode Island, the term of office is most often six years (in 18 states), and salaries range from $6,500 a year in North Dakota to $24,000 in New Jersey and $28,000 in New York.

(b) Functions

The work of the supreme court consists almost entirely in hearing and deciding appeals on questions of law coming up from the lower trial courts (or appellate courts where they exist), although in most states the court may issue certain writs, and in a few others it may give first hearing to cases of one or two types, *e.g.*, those in which the state is a party. In performing its appellate functions, the court not only adjudicates cases, but becomes—like the national Supreme Court within its sphere—the highest interpreter of the constitution and laws. Its decisions and interpretations, too, are final, with only the exception that when in a given case it can be shown (or at least plausibly alleged) that a right claimed is contingent upon construction of the federal constitution, a federal law, or a treaty, appeal may be taken to the national Supreme Court.[5] In 10 states,[6] furthermore, the constitution or a statute authorizes the governor, and in seven of these also the legislature (or either house), to call upon the court for "advisory opinions" on questions of law relating to the form and constitutionality of existing or proposed legislation. Ordinarily, however, the supreme court of a state, like the highest federal court, will express an opinion upon such questions only as they arise in the ordinary course of litigation.[7]

[4] New York somewhat perversely calls its appellate court of this grade the "supreme court." The tribunal, however, is not supreme, because above it stands a higher one, the "court of appeals."

[5] Dec[illegible]

## STRUCTURAL DEFECTS AND REMEDIES

1 The outmoded justice of the peace

In the early history of the country, when travel to the county seat (where the higher courts dispensed justice at infrequent intervals) was at best difficult and time consuming, rural justices of the peace performed useful if not indispensable, functions as tribunals near at hand for adjusting minor differences between members of the same community With the greatly improved means of travel and communication existing today such usefulness has largely disappeared, and with the office itself showing many serious defects (for example, the lack of legal training of nearly all incumbents and dependence for compensation upon business attracted and fees charged), it is not surprising that not only in most cities but sometimes in jurisdictions covering rural areas as well (*e g*, the entire states of New Jersey and Missouri) the justiceship has been completely abandoned—the commonest change being to replace justices of the old type with appointed and salaried magistrates functioning on a county wide basis under judicial supervision

2 Lack of unity (a) Among courts

In our study of state administration we saw how disadvantageous is the frequent lack of unified supervision and control over the many separate administrative officers and agencies Unhappily, the same lack too often interferes with the most effective functioning of the state s judicial machinery It seems self evident that all of the courts belonging to the so called *judicial system* should be closely articulated with one another, and that there should be some chief justice or other authority in a position to coordinate the work of the several courts, devise plans for a useful division of labor among them, transfer cases, assign judges, and do other things needed to promote speed and efficiency Instead of this, however, we find in the majority of states "a jumble of disconnected and disjointed courts, each pursuing its own way, with little regard to any other"—a "heterogeneous assortment of miscellaneous courts of miscellaneous and often overlapping jurisdiction" In earlier and simpler days, there was some unity and coherence, but so much new machinery has been tacked on without regard to system that any former articulation has almost disappeared

(b) Within courts

Likewise, in the case of any particular court, efficiency calls for a chief justice or other effective head clothed with authority to supervise the work of all judges belonging to that court, to require them to make periodic reports showing the condition of their dockets, to admonish the careless and indolent, to relieve the overworked, and to keep all reasonably busy As matters stand, however, in nearly every part of the country the judges in the same court are elected independently of one another and seldom (except usually in the case of supreme courts) are made subject to any actual directing or supervisory control Each judge can hold court when he pleases and for as few hours a day as he pleases, and hear cases on such calendars as he pleases Whatever cooperation, teamwork, or division of labor exists depends almost wholly upon voluntary action of the judges constituting the court

Where such a court does not exist private appeals often are made to the legislature and in some states this has been productive of grave abuses

**Devices for improving organization**

**1 Departments of justice**

It would seem that an important aid to the efficient functioning of a state s courts would be a state department of justice, charged with exercising general supervision over the administration of both criminal and civil justice, and with collecting and publishing the reliable judicial statistics now so commonly lacking—an agency performing for the state courts functions analogous to those performed for the federal courts by the Department of Justice and especially by the Administrative Office of the United States Courts, at Washington Only some seven states however, have created such a department, and in no one of the number does the establishment appear to be working very effectively as a unifying force In addition, about one fourth of the states have given the attorney general limited authority to supervise the work of county or other local prosecuting attorneys, but again results have not proved significant

**2 Judicial councils**

In about a dozen states, including Wisconsin Missouri, and Louisiana, the constitution vests in the supreme court 'a general superintending control over all inferior courts As yet however, such authority rarely has been employed to bring about any notable measure of unification and coordination More significant has been the setting up, in approximately three quarters of the states (starting with Ohio in 1923), of investigative and advisory judicial councils charged with collecting and studying judicial statistics, formulating rules for the equalization and more efficient handling of court business (with power in California and a few other states to put them into operation), and recommending to the legislature desirable changes in the laws governing court organization and procedure [8] In these states as elsewhere, however, many improvements remain to be made with often the adoption of a constitutional amendment a necessary first step

**3 Unified state courts**

Impressed by the efficiency of a highly integrated judicial system in Great Britain, the authors of the National Municipal League s model state constitution provide in their plan for a ' general court of justice, or unified state court, and various bar associations and interested groups have endorsed the idea The proposal is (1) that in each state all courts of the various grades (at least those having civil jurisdiction) be merged into a single state wide tribunal, organized in branches or divisions permitting judicial business to be distributed more logically and judges to develop more specialized experience and talent than now, (2) that all judges be members of this unified court and subject to service at any point in the state where needed (3) that the court be headed by an elective chief justice, perhaps with power to appoint all other judges from panels presented by the judicial council, and (4) that the chief justice, acting singly or in conjunction with the judicial council under his chairmanship, be vested with broad supervisory powers, including assigning judges to the various branches transferring them from courts with light dockets to others with heavy ones, requiring systematic reports, and imposing

rules designed to speed up business and promote uniformity of action Plans of court organization based on similar principles have yielded good results within the narrower limits of several of our larger cities, and with adoption on the state level manifestly promising large gains it is significant that Missouri in her new constitution of 1945, went a considerable distance by empowering her supreme court to make rules for all courts and to transfer judges from court to court, and that New Jersey in 1947 went farther (also in a new con stitution) by boldly adopting the unified state court system in all of its essentials Judicial reformers hope and expect that as other constitutions are rewritten or amended similar advances will be made

## JUDICIAL PERSONNEL—SELECTION AND REMOVAL

Popular election and its faults

A matter of even more frequent criticism than the lack of integration in the judicial system is the prevailing method of selecting judges In the early history of the country, judges were chosen by the legislature or appointed by the governor with concurrence of the executive council or the senate But one or the other of these methods is now retained in only 10 states, along the Atlantic seaboard,[9] in the other 38 the judges of practically all courts are chosen by popular vote, and usually in partisan elections

Long experience has disclosed two inherent weaknesses in the elective system (1) in populous communities, especially in metropolitan districts, popular election is no more likely to result in the choice of persons qualified to perform the highly technical work required of the judiciary than it is to secure the selection of experts in other branches of state government or in the field of municipal administration, and (2) what passes under the name of popular election of judges often is only a fiction, being in reality nothing more than a method of appointment by politicians who succeed in putting their judicial 'slates' through so called nonpartisan primaries, or through party primaries, or through nominating conventions All that generally is left for the voter on election day is to endorse one or the other of two judicial tickets thus submitted by irresponsible persons not interested primarily in the efficient administration of justice, and therefore quite unlikely to pick candidates having the qualities most needed in a judge, namely, unquestioned integrity, dignity, independence, judicial temperament, and adequate legal training for highly technical duties

Some partial remedies

It is not to be inferred that results under popular election are invariably bad Our state judiciary, the country over, contains plenty of judges deficient both in learning and in general ability but also many who measure up exceedingly well, and in a good many states (notably New York, Pennsylvania, Maryland, Michigan, Wisconsin Minnesota, and Iowa) the elective system has proved at least moderately satisfactory All in all, nevertheless, the plan s

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# NEW JERSEY'S COURT SYSTEM UNDER NEW CONSTITUTION

## SUPREME COURT

Chief Justice and 6 associates Jurisdiction—final appeals in selected cases as defined by the Constitution

## SUPERIOR COURT

Court has state wide jurisdiction and is divided into 3 divisions

| APPELLATE DIVISION | LAW DIVISION |
| --- | --- |
| | CHANCERY DIVISION |

Decides appeals from Law and Chancery Divisions and County Courts

## COUNTY COURT

Minimum of 1 Judge in each county Jurisdiction includes that of 5 former county courts Equity powers when required for complete determination of case Jurisdiction subject to change of law

## INFERIOR COURTS

Either created prior to and not abolished by the Constitution or created by law subsequent to the Constitution All subject to abolition or change by law

| DISTRICT COURTS | MUNICIPAL COURTS |
| --- | --- |
| JUVENILE & DOMESTIC RELATIONS COURTS | SURROGATES ACTIONS ARE PARTIALLY JUDICIAL |

All [illegible] Senate

shortcomings usually outweigh its advantages—in some states very heavily, and nearly all people except politicians are prepared to concede that a different one well might prove superior So firmly entrenched, however, is the system where it prevails, and so warmly would state and local political leaders resist abandoning it, that most proposals for reform do not go beyond devices aimed at securing better choices with popular election still operating One such expedient—subject to discount because of the manner in which politicians frequently manipulate it—is the choice of judges on nonpartisan ballots, and this method is employed in somewhat over a dozen states Another, aimed also at curtailing partisanship, is the holding of judicial elections separately from others And a third is for the state bar association to play a more aggressive rôle in informing the people on the qualifications of candidates for judicial office This has produced satisfactory results in a few states

The California plan

Still another plan, now attracting favorable attention is found in California [10] In 1934, the voters of that state approved a constitutional amendment under which (1) a judge of the supreme court or of a district court of appeals [11] may, as the end of his term approaches, declare his candidacy to succeed himself, and the people at the ensuing election simply vote for or against him, (2) if an incumbent chooses not to seek another term, the governor nominates some one for the post, and he similarly is voted on without any opposing candidate, (3) if in either case the popular vote is unfavorable, or if a judicial vacancy occurs otherwise, the governor makes a temporary appointment until the next general election when the voters approve or disapprove the person appointed, with a defeated candidate, however, ineligible for appointment to another judicial vacancy, and (4) as a further check upon the governor, all judicial appointments must be confirmed by a majority of a commission consisting of the chief justice of the supreme court, the presiding justice of the appellate court of the district involved, and the attorney general Several significant advantages of this system are obvious In the first place, judges are nominated by intelligent and responsible officials, while the ultimate selection nevertheless remains in the hands of the people Secondly, a nominee is not running against someone, but on his own record as a judge or as a lawyer, thus greatly diminishing the likelihood that irrelevant considerations will influence the voters Finally, sitting judges are relieved of the necessity of devoting a large amount of their time to political activity in order to keep their positions, all they need do is attain a good judicial record on which to appeal to the voters

Removal of judges

In the federal judicial system, judges retain their posts during good behavior, and the only mode of removing them is impeachment Even in times when state judges were largely or wholly appointive, there was a tendency to give them only limited terms, and with the spread of the elective system, the practice became general, so that today 'life" tenure survives only in Massachusetts, New Hampshire (until the age of 70), and Rhode Island As a rule, however, terms in the higher grades are relatively lengthy, and how

[10] Also with minor variations in Missouri

[11] Or of a superior (county) court if the county s voters have chosen to adopt the plan

sooner to retire incumbents proving incompetent or otherwise unfit is a problem as yet solved by no state to its entire satisfaction Any suitable method must be one which can be put into operation without undue delay, yet one also insuring for the accused judge a fair hearing before a tribunal free from partisan bias and above control by waves of popular passion Three or four methods now employed fail, in varying degrees, to meet these standards

Methods in use

1 Failure to renominate or reelect

A judge sitting by popular election may, of course, be retired by failure to secure renomination, either because his character or work is considered unsatisfactory or because party leaders want his position for some one else, and even though he wins renomination, the people may retire him by failing to vote for him in sufficient numbers at election time Popular choice, however, is almost as likely to bring wrong results as right ones For it often happens that a judge whose work has been beyond reproach is defeated for renomination or reelection by circumstances wholly unrelated to his record as judge—for example, because of the greater personal popularity or capacity for self advertisement of some less qualified rival candidate, or because some overshadowing issue in state or national politics, wholly unconnected with the judicial election, has swept down to defeat the entire party ticket on which his name appeared [12] Furthermore (apart from the recall), popular election opens a way for retiring an unworthy judge only at a given time, *i e*, at the expiration of his term of office

2 Impeachment or legislative removal or address

In most states, judges may be removed before the close of their term only by impeachment proceedings begun in the lower house of the legislature and tried before the senate The constitutions of about half of the number, however, provide also for removal (without trial) by the legislature, including some states in which the governor removes, upon "address," *i e*, concurrent resolution, of the legislature, after the English manner Neither impeachment nor legislative removal is without serious defects Under either method there is much delay, and partisan considerations are likely to influence action Furthermore, evidence sufficient to convince two thirds of the senate may be difficult to obtain, and the dereliction may not be grave enough to merit extreme measures, yet sufficiently serious to warrant public condemnation and impair the judge's usefulness In practice, impeachment and legislative removal do not really work, and unfit judges sometimes remain on the bench because no other modes of removal are available

3 Recall election

This experience has led eight states [13] to adopt the seemingly drastic policy of authorizing special elections at which the voters may recall judges whose removal is desired Thus far, however, the plan has proved drastic only on paper, in no instance has the recall been invoked against a judge of a superior or supreme court, and instances of its use against judges on lower levels have been negligible At one time, it was predicted that fear of recall would place judges under unfair pressure and even impair judicial independence, but no ground for such apprehension has thus far appeared

[12] A former able member of the Missouri supreme court once remarked that he had been chosen by the people to be judge in 1916 because Woodrow Wilson had kept us out of war and retired in 1920 because he had not

[13] Arizona California Colorado Kansas Nevada North Dakota Oregon and Wisconsin

## THE JUDICIAL PROCESS

Nature

In handling a case of any kind, a court of any grade has three essential things to do First, it must inform itself as fully as possible on the facts involved At the lower levels, *e g* , in a justice's court, this may entail little more than hearing a police officer's charges against the defendant and giving the latter a chance to reply and explain Farther up the scale, it is likely to entail, in civil cases, hearing the different versions of the two parties, with evidence introduced through witnesses or in other ways, and perhaps with final determination by a jury, and in criminal actions, a hearing of the case as presented by the prosecution, the defense as offered by the defendant and his counsel, with almost certainly witnesses heard on both sides and other evidence weighed, and with nearly always a jury striking the balance and de claring whether the facts as proved establish the defendant's guilt and in what degree In the absence of a jury whether the case be civil or criminal, facts are determined by the judge But in any event the remaining two steps necessary to complete the process fall to that official Of these, the first is to decide what provisions of law are applicable in that particular situation, and the second, to apply these provisions in terms of a specific judgment or verdict

Rules

All of these stages, furthermore, are governed by elaborate and often highly technical rules of procedure covering such matters as the rights of the accused, the admissibility of evidence, the selection of jurors, the privileges and restrictions of counsel, the rôle of the judge, and many others, and naturally the promptness and quality of justice are greatly affected by the spirit and terms of such regulations Except in so far as predetermined by occasional constitutional provisions, procedural rules were in earlier days made almost entirely by the courts themselves Nowadays, however, not only do constitution framers write them more freely into their documents, but legislatures often cover them in such detail in statutes that residuary powers of the courts to supply whatever is needed but not otherwise furnished amount to little Students of judicial administration, including many judges and lawyers, regard this development as unfortunate, not only because legislatures have neither the time nor the technical competence to perform the task satisfactorily, but because they sometimes are not above amending given rules at the behest of influential litigants hoping to gain some advantage in a particular case

Types of cases tried

1 Civil

In general, cases tried in state courts fall into two broad categories—civil and criminal A civil case arises from a dispute between two parties (a plaintiff and a defendant), one suing the other for possession or use of property, payment of a claim or debt, fulfillment of a contract, compensation (damages) for a civil wrong, or "tort," a share in a will, a divorce, or any one of many other possible things, and except when a state (as a plaintiff or with its own consent as a defendant), or one of its subdivisions, is a party, no government is involved, save in the sense of having made or authorized the

law under which actions can be brought and of having provided the judicial machinery through which settlements may be reached [14]

2 Criminal

Criminal cases are of quite a different nature From petty misdemeanors up the scale to felonies, offenses coming under the criminal laws, while usually involving personal or property damage for individuals, are regarded as injuries done to society, and their perpetrators are prosecuted by *public* officers, not in the name of individuals who may have suffered, but in that of "the people of the state of New York Ohio or Texas, as the case may be The object of the court action which follows is to determine whether the accused is guilty, if so, of what and in what, degree, and what penalty should be assessed And when the verdict is in if guilt is found, the state, which started the proceeding in the first place finishes it by seeing that the penalty is enforced

The jury system

Long before the American colonies were founded, the right of an accused person to be tried by a jury of his peers was a bulwark of English liberty, and on this side of the Atlantic it has been equally treasured In the federal sphere all persons accused of crime are guaranteed the right to "a speedy and public trial by an impartial jury and (with certain exceptions) no one may be proceeded against on a capital charge unless 'on a presentment or an indictment of a grand jury [15] State constitutions and statutes, also, everywhere abound in similar provisions Coming straight out of English common law, the jury in this country thus presents itself in two characteristic forms—the grand jury, which brings indictments against suspected persons, and the trial or petit jury, which (in addition to functioning in civil cases) determines their guilt or innocence Both are important although sharply criticized and now somewhat discounted, adjuncts of the judicial machinery described above [16]

1 The grand jury

With ordinarily the county as its area of operation, and with always criminal, rather than civil, proceedings as its field, a grand jury is a body of normally from 5 to 23 persons chosen by lot or by some other prescribed procedure, convened at regular intervals, and charged with bringing indictments on its own initiative against persons who, in its belief, have transgressed state laws and should be held for trial or, more commonly, after examining the evidence, against persons brought to its attention as suspected transgressors by a justice of the peace or by the county or district prosecuting attorney If, in the latter situation, the jury considers the evidence sufficiently incriminating it endorses on the draft indictment prepared by the prosecutor the words, 'A true bill , the foreman attaches his signature, and the accused person is held for trial If, on the other hand, the jury is not satisfied that a "prima facie case ' has been made out, it instructs its foreman to inscribe on the draft indictment, 'This bill not found," and the accused is discharged Indictments "found ' are duly reported to the county court, and the county or district attorney proceeds to prosecute

Indictment by grand jury is cumbersome and expensive, and the tendency nowadays is to get away from it In England, the land of its origin, it has been abandoned, and while in the United States it cannot be dispensed with in federal practice as long as the constitution's clause on the subject stands unchanged, in the states the device is gradually breaking down In about half of the number, grand-jury procedures still are required when felonies are involved, but optional in the case of lesser charges, and in several states the legislature is constitutionally empowered to do away with grand juries altogether The procedure invariably substituted is a simpler and more direct one known as "information," under which the prosecuting attorney, on his own initiative, merely files with the appropriate court a formal charge in which, upon his oath of office he 'gives said court to understand and be *informed* that the offense described therein has been committed by the person named

The alternative device of information

At common law, the trial or petit jury consisted of 12 impartial men chosen from the community, its function was to judge merely the facts in a case, the court itself passing upon all questions of law, verdicts could be rendered only by unanimous vote, and all criminal and substantially all civil, cases entailed the use of jury procedure Fundamentally this still is the situation Many states, however, have introduced significant modifications

2 The trial or *petit jury*

1 Whereas through long centuries it would have been inconceivable that jurors be other than men 29 states now (1951) permit women to serve and others probably will be added to the list [17]

2 In a few states *e g* Maryland and Illinois juries sometimes are judges of both law and facts

3 The constitutions of 12 states now authorize civil trials by juries of fewer than 12 persons (most commonly six), and for criminal trials seven states have similarly relaxed the old rule except in capital cases (involving a death penalty)

4 Half of the states including New York now authorize verdicts by some thing less than unanimous vote (usually three fourths) in civil cases and eight have similarly relaxed the old rule for criminal (but not including capital) cases

5 Nearly all states allow jury trial to be waived altogether in civil cases if both parties are willing and a large majority permit similar waiver in criminal cases as well when the offense is minor and the accused agrees—about one third, indeed extending the option to cases of a more serious nature although in no instance to capital cases

The grand jury has proved so defective or at any rate so unnecessary, that it is being widely discarded No such fate seems in store for the trial jury, even though, as observed, it too is not so uniformly employed as formerly But one has only to read newspapers and law journals, or even hear lawyers and judges talk, to realize that all is not entirely well with the trial jury system

Short comings

serv ... by Negroes The principle is

To start with the caliber of jurors could be improved Jury service is supposed to be one of the primary obligations of the citizen with the jury itself representing a cross section of the community Many occupational groups however including persons in public employment usually are exempted by statute business and professional people rarely are called upon to serve, and the elements from which jurymen actually are drawn are neither entirely representative nor usually of the experience and capacity that might be desired Legal exemptions ought to be cut down and the practice of letting useful people off merely because they are otherwise occupied should be tightened up Another criticism often heard from judicial experts is that whereas in federal practice judges are expected and indeed required to assist juries in understanding and evaluating evidence state judges usually are without such authority and that in the absence of such help juries often flounder and waste time occasionally bringing in verdicts influenced by serious misconceptions Finally may be mentioned the need for making the lot of the juror more tolerable by greater courtesy from court officials than sometimes is shown, and by curbing the verbosity and dilatoriness with which lawyers often draw out proceedings to inordinate length

**Judicial review**

Lower state courts confine themselves to the function for which all courts exist primarily i e deciding cases Like higher federal courts, however state supreme courts in addition pass upon the constitutionality of laws and executive actions, refusing to enforce any found contrary to a federal or state constitutional provision This they have been doing practically from the beginning of the nation s history but with increasing frequency in later decades and for reasons closely associated with the overloading of state constitutions during this period with subject matter and with detailed specifications, which ought to have been left to legislative discretion A great deal of criticism has been stirred particularly by the frequency with which social and economic legislation is invalidated (sometimes by narrow margins of four to three or three to two) on the ground of taking property or denying liberty without due process of law, and dislike of such control over public policy in virtual defiance of the people s elected representatives in the legislative branch has encouraged (1) a dozen states to adopt the popular initiative for constitutional amendments as a means of circumventing obstructive courts (2) three states (Ohio North Dakota and Nebraska) to change their constitutions so as to require something more than a bare majority for declaring a law null and void and (3) some people even to propose that due process clauses be deleted from state constitutions, leaving all protection of private rights when involving due process to the federal courts Unless expunged by the legislature a measure judicially invalidated remains of course, on the statute book, it simply no longer can be invoked against any one violating it

## PREVENTIVE JUSTICE

*Declaratory judgments*

For a long time, our state judicial establishments largely confined their activities to the redress of wrongs already committed, and agencies of "preventive justice" remained almost entirely undeveloped Only within very narrow limits was it possible to clear up in advance of hostile litigation any doubt as to the legal status of persons the title to property or the meaning of a contract In the last two or three decades, however, the view has gained favor that "a system of law that will not prevent the doing of a wrong but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society that whenever a person's legal rights are so uncertain as to cause him potential loss or disturbance, the state ought to provide instrumentalities of preventive relief to remove the uncertainty before a loss or injury has been sustained " And in pursuance of these considerations, more than 40 states, beginning with New Jersey in 1915, have authorized their courts, on proper application to define or declare rights and duties involved in an actual controversy before any suit relating to them has been instituted [18] 'Declaratory judgments thus arising too, are binding upon the parties

*Conciliation and arbitration*

The courts always have favored settlement of legal disputes by arbitration, or compromise, after a trial has commenced, and almost concurrently with the appearance of declaratory judgment laws legislation started authorizing less formal, time consuming, and expensive methods of adjusting legal disputes than prevail in ordinary judicial proceedings Small claims courts have become common, especially in cities, and special courts of conciliation and arbitration have been set up, or existing courts have been empowered to adopt rules providing for such procedures Conciliation takes place when parties to a dispute reach a settlement through the mediation of a third party called a conciliator, although an agreement of the kind is not legally enforceable in the courts In arbitration proceedings, on the other hand, the parties submit their controversey to a third party, called the arbitrator, and agree in advance to be bound by his decision, and his award is enforceable by either side like the judgment of a regular court Not the least among merits of these newer judicial agencies and practices is the way in which they tend to encourage a spirit of good-will between parties to a dispute, thereby lessening or averting the animosity and rancor usually attending hostile litigation

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PART VI

# The Government of Local Areas

## CHAPTER 43

# The County and Its Government

### THE GENERAL PATTERN OF LOCAL-GOVERNMENT UNITS

*Beginnings*

From seventeenth-century England, early Americans inherited not only a predilection for managing their own local affairs, but suitable areas or units like the county, borough, parish manor and hundred, and appropriate officials like the justice of the peace, sheriff, coroner constable, bailiff, and overseer of the poor Devotion to local autonomy has persisted throughout our history, and notwithstanding strong centralizing tendencies in recent decades, community reluctance to see functions transferred to higher levels still operates as a principal impediment to local government reform Not all units and offices brought to our shores survived Some did not fit needs in the new country, others, although persisting, underwent changes required by a different environment Two units of chief importance emerged, *i e* the town and the county—one characteristic of New England, the other of the South, with the two intermingled in middle regions like Pennsylvania, but with the county tending to dominate, and when the colonies became states, the two substantially held the field, with here and there a little chartered municipality slightly varying the picture The county existed also in New England, but only as a secondary unit, chiefly for judicial purposes

*Westward spread of the county*

As the nation expanded westward, emigrants from the seaboard states, moving as a rule along parallels of latitude, naturally transplanted into newly organized territories the plan of local government with which they had been most familiar in the old home In Southern and South-Central sections, this meant the county system, and to this day the county preponderates not only everywhere south of the Mason and Dixon line, but even in states, *e g* , Ohio, Indiana, Missouri, and Kansas, farther north but heavily infiltrated from the seaboard South The county's spread, furthermore, continued throughout the Southwest and indeed the entire farther West to the Pacific Sometimes—as in Illinois and Nebraska—two lines of migration, one from the old South and the other from the old North, meeting in a single state, gave rise to a compromise under which the inhabitants of each county were (and still are) permitted to decide for themselves, by popular vote, whether they would preserve the county as the dominant unit or break it into smaller units and main-

tain a mixed system such as meanwhile was developing widely throughout the North as a result of the rise of the township

**The township introduced**

The New England town did not similarly advance westward for the reason that, as a small self-contained area with population bound together by community tradition it was not, in its characteristic form, adapted to broad regions with population more scattered and traditions less integrated For such, the township was more suitable To pave the way for disposal of public lands lately ceded to the United States, the Congress of the Confederation enacted, and the Congress under the constitution promptly confirmed, the famous Northwest Ordinance introducing a scheme of numbered "congressional," or 'survey,' townships each six miles square, and, with the plan later extended geographically such townships still exist throughout the Middle West and some other parts of the country These, however, are not the townships which concern us here, they have no government and are of use only in describing locating, and recording land There arose, in addition, a township of different nature—the 'civil' township, also very often six miles square, sometimes coinciding with a congressional township although frequently not, and in any case unlike it in bearing a name rather than a number, and, more important, in being a unit of local government Sixteen states now contain such townships although not always covering the entire state, and all are north of the Mason and Dixon line—with township government quite unknown in the South, and likewise west of the Great Plains (except for a small part of Washington), as also of course in New England As a rule, civil townships are created and boundary changes made by the board of supervisors or commissioners of the county in which they are situated

**Other units**

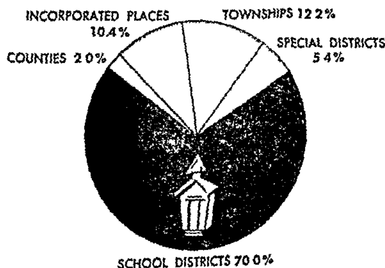
The general picture now presented therefore, is (1) counties throughout the entire United States but strongly preponderating over all other units (except cities) only in the South and West, (2) towns of the New England type dominant in six states, and (3) townships important, even if not preponderating, in a broad northern belt from New York westward to the Great Plains Everywhere, however, the situation is complicated by units of still other sorts Urban centers, both large and relatively small are set apart and incorporated as cities with their own governments Less populous places, urban or semi urban, desiring some of the powers and services of cities, are similarly incorporated as villages, boroughs, or towns And numerous artificially constructed areas, mostly small but sometimes large, and seldom coinciding geographically with any of the subdivisions thus far mentioned, are erected into school road, utility, sanitary, water-control, forest preserve, forest fire and other sorts of special" or 'single purpose," districts

**Excessive number**

Thus it comes about that the most conspicuous feature of a large scale map of any state is a network of counties, cities, towns, townships, villages and districts created for purposes of local government and administration Some are of moderate size, others extremely small, some are urban some rural, some partly both Above all they are numerous, for, fixed in horse and buggy days—largely, indeed, before the American Revolution—the local government pattern is almost everywhere that of small, usually sub-

divided, and therefore many, units for the management of affairs Until less than two decades ago, no one could have indicated the number for the country as a whole Even now, all that one can say is that the figure is in the neighborhood of 145,000, because not a year passes without some being added and others disappearing, and no provision is anywhere made for keeping a current record of such changes [1] Under modern conditions, such multiplicity is unnecessary and undesirable people can easily reach and deal with authorities at greater distances, conversely such authorities can operate over wider areas, and the piling up of jurisdictions too frequently results in duplication, confusion, and waste

UNITS OF LOCAL GOVERNMENT IN THE UNITED STATES, 1942




[1] The first complete enumeration and analysis of the local governmental units with which the count [illegible]
States (C [illegible]
originally [illegible]

## LEGAL STATUS OF LOCAL UNITS

1 As public corporations

All units of local government are public corporations, created by, or under authority of, state law to furnish their populations services believed to be more appropriately provided in this way than through private effort As such, they have continuous existence, regardless of population changes, as long as the state does not terminate them, as such, also, they enjoy all customary corporate rights, such as those of bringing suits, making contracts, and acquiring, holding, and disposing of property All, however, are not of quite the same nature and function One category, known as municipal corporations proper, includes those presumed to have been created primarily in response to local initiative based on desire for local management of affairs, and cities, villages, boroughs, and incorporated towns are of this sort A second category, termed quasi-municipal corporations, consists rather of units, created by the state (or the county as agent of the state) on its own initiative, regardless of local opinion, and for locally carrying on state-wide activities such as enforcement of law, assessment and collection of taxes, and educational and public health services, and counties, towns townships, school districts, and numerous other kinds of special districts are here included Legally, the distinction is significant, practically, it is less so, because units of both types serve at the same time as organs of self government and as areas for state administration The difference is merely one of primary purpose

2 As State instrumentalities

From the fact that all local government units are created by, or on authority of, the state in which they are situated, and by it are endowed, expressly or by fair implication, with whatever functions and powers they possess, it follows that the relation between the state and its subdivisions is totally different from that existing, in the reverse direction, between the state and the United States In the latter case, the state is not a division existing for the use and convenience of the national government, on the contrary, it is, within limits, a separate and sovereign area of government, in many respects on a footing of equality with the nation itself Whether counties, towns, townships, or districts, created primarily for state purposes, or cities, villages, or boroughs, organized primarily to meet demand for local control of local affairs, local units exist by no original or inherent right and have no reserved or residual powers On the contrary, all (at least broadly) are instrumentalities of the state, employed by it in the enforcement of its laws and the performance of others of its functions In short, the United States is organized on a federal basis, but the governmental system of each state is strictly unitary

## THE COUNTY—GENERAL FEATURES

Number size and population

Throughout most of the country, the county is both the largest and most typical unit of rural local government—even in Louisiana where counties are called parishes, but otherwise are not different Most states have from 50 to 100 counties In Delaware and Connecticut, however, there are only three and

eight, respectively, while in Georgia, there are 159 and in Texas 254 Massachusetts, with 14, has the smallest number in proportion to population Arlington county, Virginia, and San Bernardino county, California, have the distinction of being respectively, the smallest and the largest of counties, the former having an area of only 25 square miles, the latter of 20 175 [1a] The most common areas are between 400 and 600 square miles In population, also there is great variation, running all the way from Armstrong county in South Dakota, which at the census of 1950 had only 52 inhabitants to Cook county, Illinois, with more than 4 5 million The majority have populations between 10,000 and 50,000 The greater number, too are decidedly rural not many more than one fifth contain any urban communities of over 10 000 inhabitants

The problem of consolidation

In early days, when travel was mainly on horseback or by horse and buggy, a large number of counties in a state could be justified because of making possible the location of county seats within a day's round trip from any part of the county Today despite the railroad the automobile and the telephone, the number of counties remains about what it formerly was, eight states having 100 or more With population shifting from section to section, and even within the same section, many of these old counties have come to be sparsely inhabited All, however often are required by rigid constitutional or statutory provisions to maintain the same forms of government as more favored ones, in addition, they must meet the costs of improved highways and of the multiplied social services now added to older county functions—with the result that numerous small and poor counties have been utterly bankrupted In this situation, taxpayers would find it greatly to their advantage to inquire into the economies that might be realized from merging two or more small neighboring counties, or consolidating a small county with a larger and more prosperous one Indeed, in most states they would be better off with the number of counties reduced by a third, or even half The matter has received attention in many states, by constitutional provision or statute, consolidations have been authorized in several, and a very limited number of consolidations (in fact, two) have taken place Local pride opposition of county office holders and county-seat tradesmen, and reluctance of legislatures to force the matter, joined to constitutional obstacles, have however, kept the reform from moving at more than a snail s pace [2]

The county's complicated rôle

The rôle played by the county in our scheme of local government is far from easy to evaluate In the first place, it is not the same in all parts of the country In New England, the county has no great importance except as a judicial unit, in the South and Far West, it presents the opposite extreme controlling courts, education public health, public works, welfare, highways and many other things, in the Middle and Midwestern states, it holds an im

[1a] There [illegible]

mediate position, frequently sharing many of the functions named with the township In the second place, the county is at the same time an area for purposes of its own locally-controlled government and an area for carrying on state administrative and judicial activities, indeed, it is an area for the performance of a few functions (*e g* , old-age assistance and airport development in some states) promoted by the national government as well And in many instances the powers and duties involved overlap and can be disentangled only by one willing to spend patient hours grubbing in the laws, records, and accounts stored up in the courthouse Observing the steady transfer of functions from county to state in later years—to say nothing of the ever-advancing hand of the national government—some people not only have been puzzled about what the role of the county nowadays really is, but even have predicted that, whatever it is, it is doomed to extinction, with the county itself disappearing or remaining as only a state-federal administrative district Such observers, however, fail to perceive that if the county as a self-governing unit is losing, it is also gaining—that, indeed, the number of functions passing under state or national control is quite counterbalanced, if not more, by the number of new ones acquired as activities on all government levels continue to multiply Judged, in fact, by the variety of functions performed (for the county itself or by it for state or nation), the number of employees on its payroll, and the amounts of money expended, the county is today, on the whole, a more vital part of our governmental system than at any time past.

Position under state control

Counties are created and their boundaries fixed by legislative act, with however, constitutional provisions usually protecting them against extinction or loss of territory unless assented to by the voters concerned Sometimes their form of organization, the officers they shall have, and the powers they may exercise are prescribed in a general county code, but sometimes, too such matters are dealt with for individual counties in special acts, occasionally with confusing results In any event, rigid restrictions, *e g* , on tax rates or on indebtedness, may be imposed Moreover, except for very populous ones, all counties in a state commonly must have the same basic functions and powers, with the result of small and sparsely settled ones being compelled to maintain a needlessly elaborate and cumbersome governmental organization, at a cost out of all proportion to the services rendered

A possible alternative would be to classify counties with a view to a uniform scheme of government simply for those belonging to the same class, and under this plan Missouri, in her constitution of 1945, not only authorizes four classes of counties but empowers the legislature to provide a different form of government, with appropriate powers, for each Another alternative would be to institute, as in North Dakota, a system of optional charters enabling each county to adopt, by popular vote, any one of several approved forms, and Georgia authorizes this plan in her constitution of 1945 Still another possibility is county home rule charters, with the voters of a county authorized to elect a charter commission to draft a county charter suited to local needs—subject to the state constitution and statutes, and to popular ratification Obviously resembling the home-rule charter system often employed for cities

this plan has been gaining in favor, although thus far only eight states have adopted it, all by constitutional amendment.[3]

## THE STRUCTURE OF COUNTY GOVERNMENT—THE COUNTY BOARD

Confusing variety

To the governmental organization of counties, little thought appears to have been given by constitutional conventions state legislatures, or the general public—at any rate in comparison with the attention bestowed on the government of states and cities As mere quasi corporations, they have not been expected to have full orbed governments with the traditional three fold division of powers, and, notwithstanding usually a certain general uniformity, their organization commonly differs not only from state to state, but even from county to county within the same state City governments are of several different types, *e g*, mayor-council, commission, council manager But, speaking broadly, all city governments of the same type are much alike, allowing only for differences of population and physical environment County governments, on the other hand, classify in no such convenient fashion, often conforming only, as a critic has remarked to the one principle of confusion! There are officers, boards, and commissions, but without standardized names, some are elected, others are appointed still others are *ex officio* each often occupies an island of separate power, with hardly a trace of supervision or coordination, there are deputies, assistants, and employees—sometimes small armies of them And usually the over-all impression gained by any one seeking to penetrate the labyrinth is that of a sheer jumble Amid the disorder, however, arises one agency—the county board—which comes closest to being a central governing body, and it calls for first consideration here

The county board

1 Structure

Although under different names, a county board is found in all states except Rhode Island, where there are five counties for judicial purposes but no organized county governments, and with few exceptions (mainly in the South), the body is everywhere elective, with the term two years in about one-fourth of all counties and four years in nearly half Structurally, there are two main types One is a board made large by allotting one or more representatives (locally elected as supervisors) to every town or township and to every city ward within the county, and such a "board of supervisors" (found chiefly in New York, New Jersey, Virginia, Michigan and Wisconsin, and in parts of Kentucky, Tennessee, and Louisiana) often has 40 or 50 members—in Dane county (Madison), Wisconsin, 82, and in Wayne county (Detroit), Michigan, 84 The other type is a board consisting rather of a few—oftenest three, but sometimes five, seven, or more—"commissioners" chosen usually by the voters of the county at large, and known as a "board of commissioners", and at least 70 per cent of all counties have a board of this nature, although with sometimes (as in Illinois) boards of both kinds found in the same state

Arguments can be advanced for both types In so far as the board is a

[3] California (1911) Maryland (1913) Ohio and Texas (1933) New York (1935), Missouri and Georgia (1945), and Washington (1948)

legislative body, the broader representation provided by a large membership seems appropriate, and in many localities the constituent areas of the county cling resolutely to it As will appear, however, the board's function are far more administrative than legislative, and for purposes of administration, the small board is clearly preferable Large boards must do most of their work through more or less autonomous and irresponsible committees appointed by the chairman, often are scenes of petty logrolling among members owing primary allegiance to their townships, and are more expensive If counties were properly organized, with an integrated administrative branch and the board simply a policy determining agency, a board of intermediate size probably would be desirable But as it is, the large board rarely or never is satisfactory

2 Organization

In some states, the county judge or some other designated official serves as *ex officio* chairman, and in a few instances, *e g*, Cook county, Illinois, a chairman is elected by the people Usually, however, the board members choose their own chairman In any case, with occasional exceptions, the incumbent has little if any more power (except for appointing committees) than his associates Working chiefly through committees, large boards meet hardly oftener than once a month With committees less feasible, small ones commonly meet more frequently

3 Powers and functions

(a) Legislative

In powers and functions, as in other respects, the county board is purely a creature of the state, there is no means by which it can be so endowed by the people of the county On the other hand, all powers conferred upon the county and not delegated by law to any other authority are regarded as belonging to the board On the legislative side, power to regulate such activities as zoning and the sale of liquor outside of municipalities is now more frequently conferred than formerly, but the one important field of authority is finance Here, the board levies taxes for county purposes, levies the county's share of the general property tax for support, if any, of the state government, authorizes and arranges loans, usually through bond issues, equalizes (in many states) the assessment of taxes among the different townships and cities, serves (in some states) as a board of review to hear and decide protests of taxpayers against property valuations made by local assessors, fixes the salaries or other compensation of minor county officials and employees, determines the size and character of grants, if any, to townships, and, in practically all states, makes appropriations of county funds for various county purposes

(b) Administrative

Administrative powers and duties vary widely, particularly as a result of special legislation for counties enacted at many of our state capitals A general enumeration (by no means complete) might run somewhat as follows

1 Custody of county property, such as the courthouse, jail, almshouse hospital and library

2 Leasing and erecting other buildings needed by county officers and services

3 Letting contracts for printing and for furnishing equipment for county buildings, office supplies and materials used in county institutions

4 Settling claims and passing upon the allowance of all bills and accounts where there is no county auditor or comptroller

5 Appointing, and to a more limited extent removing county officers assistants and deputies to such officers and many employees

6 Licensing certain trades and occupations such as liquor selling operating hotels or inns auctioneering and peddling

7 Organizing townships school and road districts and other county sub divisions created for special purposes

8 Controlling the location construction and repair of highways the con struction and maintenance of bridges and in some states the provision and protection of airports

9 Undertaking public works like levees dikes drainage ditches, and irrigation facilities

10 Supervising the county's poor relief and other charitable work

11 In most states outside of New England marking out voting precincts designating polling places, appointing election officials, preparing printing, and distributing the ballots used on primary and election days and after an election is over, serving as a board to canvass the results and certify them to the proper county and state officers

In populous counties, the board is likely to have power to fill a very large number of positions on the county payroll and appointments frequently show the spoils system at its worst Nine states, however have merit laws applying either to all counties or to more populous ones and more than 200 counties have made some effort to supplant spoils by competitive civil service examinations

## PRINCIPAL COUNTY OFFICERS

Besides the county board, counties in every state except Rhode Island have six or more elective officers, all largely independent of one another, of the county board, and usually of the officers of the state as well Titles and duties vary widely, but the officers of chief importance always are the sheriff and the prosecuting attorney

1 Sheriff

Historically descended from the old Saxon shire reeve, the sheriff is found in every state, and everywhere is elective except in Rhode Island, where he is appointed by the governor, and in New York City, where a single sheriff for the five counties is appointed by the mayor His term most frequently is two years, and in a number of states the constitution unwisely makes him ineligible for immediate reelection Included among his prerogatives is that of appoint ing an indefinite number of deputies, whose powers become the same as his own but with himself responsible for any official acts performed by them In most states he is a salaried official, but sometimes both he and his deputies re- ceive much (if not all) of their compensation in the form of fees, which, in very populous counties, sometimes mount to tens of thousands of dollars a year

(a) Police duties

The duties most commonly assigned to the sheriff fall into two main groups those relating to the preservation of the public peace, sometimes called police duties and those connected with the operation of the courts On paper, the sheriff s police duties are impressive, including management of the county jail, arrest [illegible] charged with crimes or misdemeanors, and enforce[illegible] e, and liquor selling Except howev[illegible] portions of the country, they

actually are quite limited No county police, corresponding to a city police force, is at the sheriff's command,[4] and as a rule neither town and village constables nor city police units are in any way subject to his control In time of public disorder, therefore, the sheriff is likely to be obliged to summon to his aid the *posse comitatus* (*i e*, such able-bodied men of the county as he may select), or even to call upon the governor for assistance from the state militia or—where such a force exists—the state police

(b) Court duties

The greater portion of a sheriff's time is consumed in performing his duties as executive agent of the courts He attends court sessions, he serves the various writs and other processes in connection with civil suits, and also warrants for the arrest of persons accused of crime and subpœnas for the attendance of witnesses, he carries out the judgments of the courts in civil cases (for example, seizing and selling property to satisfy judgments) and executes court sentences upon persons convicted of crimes or misdemeanors And with these activities more lucrative than tracking down criminals, they often are the ones to which the sheriff devotes himself most assiduously

Although elected locally, sheriffs are, in law, agents of the state, and many, if not most, of their functions have to do with the enforcement of state laws In only very few states however, do the higher state officials exercise effective control over them In New York Michigan, and Wisconsin, the governor may remove a sheriff for cause, and in Illinois, he must remove one who allows a prisoner to be taken from his custody by a mob

2 Prosecuting attorney

Of considerably larger importance is the prosecuting attorney—known in different states as state's attorney, district attorney, or county solicitor Generally such an official is elected in each county, but in some states he is (or may be) chosen in a district containing more than one county, in which case his jurisdiction is, of course, not restricted to a single county, but extends throughout his district Varying greatly in character and ability, prosecuting attorneys are likely to reflect the dominant sentiment of their communities toward law enforcement—a fact at least partly explaining the unfortunate lack of uniformity sometimes found in different parts of the same state in the enforcement of laws against gambling, vice, illicit liquor-selling, and other offenses However chosen and supervised, the prosecuting attorney is paid a salary in a number of states, and in others is recompensed with fees, but the tendency is to substitute salaries for fees

(a) Civil duties

In most states, the prosecuting attorney has important civil duties He is the legal adviser to most, if not all, of the county officials, he draws up and passes upon the validity of county contracts, he institutes and conducts suits brought by the county and defends those brought against the county, or against any officer thereof in his official capacity, he prosecutes all cases of forfeited official or jail bonds, and frequently he cooperates with the attorney general of the state in handling important cases affecting the county

(b) Law enforcement

But the official s most conspicuous duties, as his title implies, relate to the enforcement of criminal statutes, and the extent to which crime is repressed

[4] An exception is found in Los Angeles county California where the sheriff has direct authority over a uniformed trained and equipped police force of several hundred men

depends largely on his ability, judgment, and energy. He investigates crimes which come to his attention through the public press, the police, or on complaint of private citizens, he institutes proceedings for the arrest and detention of persons accused or suspected, and the detention of important witnesses who otherwise might leave the state, when in his judgment situations warrant doing so, he commences criminal actions, either by filing informations' with the proper court or by drawing up indictments and submitting evidence to a grand jury, and, either in person or by deputy, he conducts the trial of criminal cases.[5] Recommendations which he makes concerning bail, the discontinuance or nolleprossing of criminal actions, and severity of sentences usually are given serious consideration by the courts, his advice is usually sought also by state parole authorities. Often it is made his duty to bring to trial public officers accused of official misconduct.

(c) Demands of the office

The office is indeed one of great responsibility, and invested with weighty possibilities for good or evil. Control of it in counties containing large cities is a political prize of the first magnitude for both the law abiding classes and the criminal and vicious elements interested in law enforcement and a "wide-open town." It should invariably go to a lawyer of unquestioned ability, a citizen of the highest character, a man forceful and fearless in the discharge of duty, and one above suspicion of being controlled by, or under obligation to, any political organization. Courageous and efficient prosecuting attorneys often have won distinction and political advancement.

3. Coroner

The office of coroner is of nearly the same antiquity as that of sheriff, although now considerably less important. Almost everywhere, the incumbent is popularly elected, for two or four years, although in six or seven states he is appointed by the county board or by the judges of one of the higher courts. As set forth in a New York statute, the coroner's main function is to investigate the circumstances under which any person has died 'from criminal violence or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner." When holding an inquest to determine the cause of a death, a coroner acts both as a medical examiner and as a magistrate, with authority in the latter rôle to conduct a hearing and examine witnesses, and he may act singly or may (in some states must) enlist the assistance of a jury, usually of six, selected from bystanders or other people of the neighborhood. A verdict of natural death, accidental death, or suicide usually ends the matter. If, however, reason appears for believing some person or persons to have been criminally responsible, the district attorney or police are supposed to start work on the case, with the coroner himself empowered to issue a warrant for the arrest of any suspect whose identity is known. In many counties the coroner's office is little more than a booby prize awarded to some insignificant adherent of the dominant political machine, with most incumbents having neither the medical nor legal qualifications presumed, and a far better situation exists in five New

[5] To the end that poor persons charged with crimes or misdemeanors may have honest legal advice and competent aid when tried, the office of public defender has been introduced in some parts of the country, e.g., in Los Angeles county, California. More that 150 communities indeed have agencies prepared to furnish counsel to persons unable to afford the services of a lawyer.

England and Southern states[6] (also in New York City), where the coroner has been supplanted by an appointive "medical examiner" (full time in larger cities), required to have competence as a physician or pathologist and with all legal aspects of the work left to the prosecuting attorney.[7] The coroner well may be on his way out along with the justice of the peace.

**4 Clerk** In about half of the states, there is a county clerk, nearly always popularly elected, and for two or four years. Duties vary, but usually include (1) serving as secretary to the county board, (2) making formal records of ordinances, resolutions and other board actions, (3) performing the duties of an auditor or comptroller where no such officer exists, and (4) issuing marriage licenses, hunting and fishing licenses, and other licenses and permits. Not infrequently, too, the clerk has electoral duties, such as registering voters, receiving nomination petitions, and supervising the preparation of ballots. In any event, he is a general clearing officer for county business, and in one or two states, *e g*, Wisconsin, he somewhat approaches the character of a county chief executive.

**5 Other offices and boards** This outline of county offices might be continued at wearisome length, because the list (not all found in the same counties) is lengthy. For the rest, it must, however, serve merely to enumerate rather than describe, and even at that, by no means all will be mentioned. In probably every instance, the general nature of the duties attached will be apparent from the name. Most commonly encountered are (1) one or more court clerks, (2) a treasurer, (3) an auditor or comptroller, (4) a recorder or register of deeds, (5) a superintendent of schools, (6) a surveyor, (7) a highway superintendent, (8) an assessor, (9) a county agricultural agent, (10) a female home demonstration agent, (11) a health officer, (12) a welfare superintendent, (13) a purchasing officer, and (14) a veterinarian, and of boards, (1) a board of [tax assessment] review, (2) a board of education, (3) a library board, (4) an election board, and (5) a planning commission.

## THE PROBLEM OF COUNTY REFORM

**Belated recognition of a bad situation** Thirty-five years ago, a challenging book was published under the title of *The County, The Dark Continent of American Politics*.[8] What the author had in mind was not only that county government was a labyrinth whose intricate windings were known to very few people except self-seeking politicians but that even professional students of government had paid only scant attention to it in comparison with the governments of nation, state, and city. To a considerable extent, this unfortunate situation still exists, at all events, most otherwise well informed men and women even now know but little about county affairs. In the interval, however, an increasing number of disinterested explorers have penetrated the jungle in different states (notably New York, New Jersey, Illinois, Minnesota, North Carolina, and Virginia), afterwards reporting what they found. And all accounts agree that in general the county

[6] Massachusetts, New Hampshire, Rhode Island, Maryland, and Virginia.
[7] In Virginia the name "coroner" is retained but not the former type of office.
[8] The author was H. S. Gilbertson and the place and date were New York, 1917.

has been largely untouched by reform movements which have yielded remarkable improvements in states and especially in cities, that not one of the 48 states has worked out a genuinely satisfactory system of county government, and that, almost everywhere, cumbersome machinery and antiquated methods persist, along with divided, diffused, and diluted authority and responsibility—defects which, until the depression of two decades ago, went practically unchallenged

Troubles associated with that hard experience did what scattered reformers never had succeeded in doing they convinced public officials and taxpayers alike that there was more ground for criticism than they had been wont to admit—that, indeed, county government almost everywhere was fundamentally defective Even yet, changes for the better have been only sporadic People, in general, however, now have somewhat increased appreciation of the problem, as also of the obstacles to be encountered in solving it, and the critics get increased attention for what they have to say about (1) the excessive number of counties, (2) the extreme standardization of county functions and controls in many states, (3) the size and powers of county boards, (4) the selection of county officers, (5) the need for administrative reorganization, (6) the lack of a county chief executive, (7) duplication of activities between counties and large cities, and (8) financial looseness and extravagance The first two of these matters were touched upon earlier in this chapter, the others require a word of comment here

Short comings and suggested remedies

1 Defects of the county board

In New York, New Jersey, Michigan, Wisconsin, and other states in which overgrown boards of county supervisors persist, the greatest single improvement would be the substitution of a small board of commissioners chosen either at large or from very few districts This, however, would merely bring the large board states into line with the great majority, leaving untouched a need generally common to county boards (as long, at any rate, as they continue to be expected to supervise administration), namely, the need not only for increased policy making authority, but especially for more control over county officials and employees in the interest of better integrated and more responsible management of affairs

2 Multiplicity of elective offices

With respect to county offices generally, it has been pointed out repeatedly that too many are elective, with the result of lengthening the ballot and tending to confuse the voter on election day The county board should be elective, but all other officers, with the possible exception of the auditor or comptroller, should be appointive The coroner, in particular, should cease to be an elective official, and the office well might be abolished and its duties transferred

If such county officers ceased to be elective, where should the appointing power be lodged? The answer is that it should be distributed according to the nature of the work to be performed First of all, the state should not only appoint but pay all so called county officers whose chief, if not only, duty is to enforce state laws for the suppression and punishment of vice and crime, precisely as the national government appoints and pays the corresponding national officials operating in the states, *i e*, the United States marshals, commissioners, district attorneys, and district judges The work of the sheriff,

prosecuting attorney, and county judge is really not county work at all, except geographically, in nature it is state work, and although elected by the people of the county the officers who perform it serve the people of the state as a whole Their appointment compensation, and removal by the state would tend to prevent much of the local nullification of state laws now so common, and properly would throw upon the state legislature the burden of facing any public hostility to given laws The sheriff should be appointed and removed by the governor the prosecuting attorney, either by the governor or by the attorney general preferably the latter On the other hand clerks of the courts should be appointed by the courts which they serve, and county treasurers assessors superintendents of schools and other miscellaneous officials serving only the county should be appointed directly or indirectly, and removable also, by the county board or (as explained below) by a county manager or other executive Finally all subordinates and employees should be selected, promoted and dismissed in accordance with a carefully planned merit system

**3 Need for administrative reorganization**

Comment above concerning the county board s relation to administration suggests changes that would result in still greater improvement With rare exceptions, county governments are not departmentalized and correlated being on the contrary mere aggregations of scattered and almost independent offices and boards with much overlapping and waste Instead, for example of being integrated under a department of welfare the county almshouse,[9] relief to the needy in their homes children s aid, old age assistance, and the like commonly are administered by entirely separate agencies, and so with activities pertaining to finance public works and other things The need is for an assembling of all or substantially all administrative agencies in unified departments, not of course, in conformity with a single rigid pattern, but varied as differences of population and other conditions might suggest Almost any county should have departments of finance public works, public welfare, and law enforcement Counties serving as the principal unit for school administration would need a department of education, and populous ones, with more activities, would require still others

**4 Lack of a chief executive**

In nearly all counties a particularly serious shortcoming is the lack of any chief executive, and the administrative reorganization suggested would quite fall short unless some such apex as in city state, and nation, were provided In a few scattered counties, something approaching such a unifying authority has been supplied—for example, in Nassau and Westchester counties, New York, in the form of an elective executive head with powers of appointment removal, supervision, and veto, and in Cook county (Chicago), Illinois in the guise of an elective president of the county board Such arrangements however, are wholly exceptional, and probably will continue to be, unless the

[9] When the federal Social Security Act of [illegible] that for such they the for

idea of an executive of somewhat different nature, now gradually coming into favor, takes firmer hold than it as yet has done

**The county managership**

This newer type of executive is the county manager, patterned after the city manager now found in over 1,000 medium sized and smaller municipalities scattered over the country [10] Under authority to vest limited duties of a managerial nature in some one of the older county officials *e g* the chairman of the county board, the county clerk, or the auditor some counties *e g* in California, Georgia, North Carolina Virginia and Wisconsin have taken hesitant steps in the direction of a managership The true managership however, is of different character Where it exists a full time salaried manager is appointed by the county board, for no fixed term and presumably without reference to politics or local residence, and to him is assigned under responsibility to the board, and through it to the electorate, the entire task of coordinating and directing county administration The board continues to levy taxes, borrow and appropriate money, enact ordinances and determine the nature and extent of county services, But it is supposed to leave the conduct of administration entirely to the manager and the higher officials appointed by and responsible to him, and operating through the integrated departments which almost of necessity go along with the system If the board does not approve of the way in which things are done its proper course is to change managers rather than to interfere with and embarrass the existing one

**Its outlook**

Constitutional or statutory authorization of the manager system in a few states, followed by actual adoption in 16 scattered counties by 1951 [11] undoubtedly may be regarded as the most significant advance recently recorded in the field of county government Many obstacles are encountered tradition, which perhaps is nowhere stronger than in local government, hostility of political machines, popular fear of one man rule", and constitutional impediments, as for example, in Nebraska, where an optional county manager act of 1933 was overthrown as incompatible with a constitutional requirement that all county offices be elective In any state authorizing county home rule, however, the plan may be adopted by any county to which the privilege applies, in other states, it usually is constitutionally possible for the legislature to approve the system for a particular county, and with testimony almost universal, where the scheme has been tried that it yields good results, further progress may be confidently predicted The one qualification to be added is that experience thus far has been almost entirely in populous, urbanized counties, and that it is there rather than in sparsely inhabited counties with comparatively few activities, that one would expect the system s benefits to be greatest In strictly rural counties of small population, it might prove too expensive—although from the one such county in the present list (Petroleum county, Montana, with a declining population in 1950 of less than one per square mile) come no less impressive reports of successful operation

[10] See pp 708 711 below

[11] Sacramento San Mateo, and Santa Clara (Calif ) Fulton (Ga ) Montgomery and Anne Arundel (Md ) Petroleum (Mont ) Monroe (N Y ) Durham and Guilford (N C ) Charleston (S C ) McMinn (Tenn ) and Albemarle Arlington Henrico and Warwick (Va )

5 County city confusion

Where a county contains a large city, one is likely to find two full sets of officials performing similar or even the same services for substantially the same people, with resulting confusion and waste Within the corporate limits of Chicago reside more than nine-tenths of the inhabitants of Cook county, and from them comes about the same proportion of taxes paid Nevertheless more than a dozen activities are largely duplicated No useful purpose is served, the cost of government is augmented, and the lengthened ballot imposes an unnecessary burden on the voters In such cases in England, the city (borough) is given full county powers and operates under a single "county borough" government And in the United States, one solution found is similar Baltimore and St Louis have, as municipalities, been separated from their respective counties, taking over county functions within their limits and leaving whatever remains of the county to operate its own independent county government, and Virginia segregates cities of 10,000 population or over from the counties containing them, with county functions inside corporation limits performed entirely by municipal officials When a city is practically coterminous with a county, the problem is different, and in this situation Denver and San Francisco are found with city and county wholly consolidated under a single municipal government Many instances remain, however, in which one remedy or the other—separation or consolidation—could usefully be applied

6 Financial looseness and extravagance

Inefficiency and needlessly expensive methods pervade county business in general, and especially the handling of finances In more populous counties and as an effect of spoils, one often finds an excessive number of employees on the payroll All too frequently, too, there is nothing worthy of the name of county budget and nothing that a business man would recognize as a unified accounting system So crude, indeed, has been county bookkeeping at times that a newly elected county board might be quite unable to ascertain the amount of bonded indebtedness, the range of outstanding obligations, and the volume of uncollected taxes, or to secure other essential information

Reforms in some states

The pocket-book nerve is the most sensitive part of the average taxpayer's anatomy, and it is not surprising that here and there significant steps have been taken to remedy loose financial methods In most New England states and one or two others, county finances are almost entirely managed by the state legislature or the county delegation therein, in Indiana, a specially elected county council has taken over both the taxing and appropriating powers of the county board, and in New York, Ohio, Minnesota, Iowa, and other states, provision has been made for state supervision, audit, or inspection of county financial transactions In New York, for example, the state comptroller has authority to send examiners to any county to investigate and report on its financial condition New York, Iowa, Nebraska, and a number of other states prescribe uniform accounting systems for all counties, California, North Carolina, Florida and half a dozen other states require counties to follow a uniform budget system, and in 1938 New Jersey established a state department of local government endowed with broad powers of supervision and control over the fiscal affairs of local units In not a few instances, state

supervision has resulted in noteworthy improvements But more might be achieved if legislative appropriations for the purpose were adequate

## PREREQUISITES OF REFORM—LEGISLATION AND CONSTITUTIONAL AMENDMENT

Even if the people of a county are fully aware of the need for reforms—which usually they are not—they are, by themselves, not in a position to carry out any thorough renovation Nevertheless, they need not feel completely frustrated An aroused public opinion might compel the county board to adopt a sort of self-denying ordinance and introduce the managership into the existing government, as a number of cities and villages have done, without waiting for special authorization from the legislature A progressive county board also might, without waiting for legislative action authorize an expert survey of county government and administration such as in many instances has paved the way for the reorganization of a city government Within limits, it might also on its own initiative, consolidate offices, or at least introduce more business like methods in them Sooner or later, however, if reform is to be carried far, necessity will arise for appealing to the legislature, and even beyond it to the procedures of constitutional amendment

Potentialities of legislation

Probably no legislature is without power to provide for a thorough survey of county government either throughout the state or in a few typical counties, to authorize county boards to employ a manager or purchasing agent, to abolish or curtail the fee system still adhering to many county offices, to require a uniform accounting system, periodical financial reports in standard forms, and modern budgetary methods, and to introduce some degree of improvement in the assessment and collection of taxes Furthermore, any legislature could order a codification of all existing laws relating to the duties of the various county and local officers, to be accompanied by a handbook or manual for ready reference, thereby relieving inexperienced officials of the burden of threading their way through the labyrinth of compiled statutes and confusing session laws in a more or less futile effort to find out what their duties and limitations are—a task not always performed satisfactorily even by the most conscientious The legislature also might enact a county civil service law (as in California in 1939 and New York in 1941), abolish unnecessary county offices created by statute and reassign their functions, and convert statutory elective offices into appointive ones, thereby hastening the advent of the short ballot and facilitating intelligent voting

Ultimate need for constitutional amendment

Even the most intelligent and sympathetic legislature, however, usually is limited, under existing powers, in what it may do to promote better county government, because in most states "the roots of county government are imbedded in the legal granite of the state constitution and can be removed only by blasting them out with a constitutional amendment" Not only is the legislature often restrained from shortening the ballot by constitutional provisions making all offices elective, but frequently it is hampered by provisions

imposing a uniform type of government upon all counties, limiting the amount and incidence of county taxation, restricting the extent of bonded indebtedness, and requiring unnecessary and costly duplication of county and city offices Nothing less, therefore, than a series of constitutional amendments will clear the way, in probably any state, for the simplification and unification of county organization essential to genuinely democratic local government. Reform proposals of such drastic character, however, especially if involving even temporary disadvantages for local politicians, are likely to encounter sturdy opposition, for the county commonly is the most important unit of "grassroots" party organization, and county government the chief reservoir of party resources in local political contests.

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CHAPTER 14

# The Government of Cities

"Cities" and "municipalities"

When the federal census of 1950 was taken, 95.9 million of our people, or a little over 64 per cent, were found to be urban and 53.9 million, or about 36 per cent, rural. Even so vast an urban population, however, does not include all persons living in municipalities, because while the Bureau of the Census classifies as urban all places of 2,500 population or over,[1] many people dwell in less populous villages, boroughs, and other places which, in the eye of the law, are municipalities because of having been incorporated and empowered to render municipal services. In a few states, e.g., Kansas, even the smallest municipalities are called cities—"cities of the third [or some other] class." Usually, however, the term is reserved for places of appreciable size—places often that once were incorporated as a village, borough, or town, but, gaining in population and wanting more powers, were in time incorporated anew as a city. At all events, many people classed under the census as rural live under a municipal government and, conversely, some classed as urban never have been "municipalized." The present chapter is concerned with municipal government on what may be viewed broadly as the city level, the municipal status of lesser units will be touched upon later.[2]

Significance of city government

For a number of reasons, the government of cities is a matter of prime concern in this country. In the first place, nearly twice as many people live in cities as outside of them, and if anything like the present rate of urban growth is maintained, the proportion will reach three to one within the present generation. A second consideration is the peculiarly intimate way in which city government touches the life and well-being of persons living under it. For protection against foreign subjugation, people are, of course, dependent upon the national government. For many benefits, they rely upon their state government. But on the local level, no government means as much to them as that of their city—none takes so large a share of their property taxes, none renders in return so many, or such essential, daily services, none can do so much harm by being inefficient, wasteful, or corrupt.

[1] Somewhat revising its earlier basis of classification, the Bureau in 1950 reckoned as urban all inhabitants of (1) incorporated places of 2,500 or more, (2) urban fringe areas not included in such incorporated places, and (3) unincorporated places of 2,500 or more outside of fringe areas.

[2] In Chap. 46 below.

In the third place, city government offers one of the foremost challenges arising from our political system. Complicating or adverse conditions often having to be met, and if possible overcome, are plentiful. Five cities have more than a million inhabitants, 18 more than half a million, and rapid growth of these and scores of lesser places perpetually raises new police, housing, educational, recreational, financial, and other problems. *Overlapping* intra-city jurisdictions, as of school and other special districts, introduce complexity. Immigration brings into cities the larger part of our population inexperienced with democratic government. Urban concentration of industry results in massed labor, with all its attendant issues of housing, industrial regulation, and labor management relations. Heavy movement of Negroes from country and small towns to larger places, especially in the North, intensifies problems of racial relations. The spilling-over of urban dwellers into suburban fringes shrinks the municipal tax base and complicates urban activities. Racketeering and crime, vice, juvenile delinquency, divorce, unemployment, poverty—all are commoner in cities than elsewhere, and nowhere are people more dependent, or more insistent, upon government-provided services. Fortunately, cities are centers also of wealth, initiative, influence, and achievement; otherwise, they certainly could not keep pace with ever mounting demands upon them and their governments.

## THE CITY UNDER THE STATE—CHARTER SYSTEMS

**The city and its charter**

The county is a quasi corporation created by the state as a convenience for carrying on its activities, the city, a corporation proper created primarily to meet the desire of an urban locality for management of its own affairs. This does not mean, however, that the city is exempt from state control. Far to the contrary, it is in the state, is a part of the state, and owes its very existence as a legal, corporate entity to the state. Every city has as its organic law a *charter* (either a separate one or one shared with other cities through the medium of a code), granted by the legislature or locally framed under legislative authority, and defining the city's powers, outlining its system of government, prescribing the method of electing its officials, fixing the duties of such officials, and covering other things as well. Moreover, like other statutory enactments or authorizations, such charters may be suspended, altered, or revoked by legislative fiat, even against the expressed wishes of the people concerned, and, within limits permitted by the state constitution, additional regulations may be imposed, either in general laws applicable to all cities (or to those of a class) or in special acts for particular municipalities.

**Charter systems**

In earlier days, rigorous controls through these channels not only kept cities in straitjackets but often were so arbitrary and unjust as to inflict serious hardships, and by the opening of the present century demand for liberation and autonomy became so insistent that, through constitutional amendment or otherwise, special legislation for cities was widely curtailed, with in some cases "home rule" systems instituted permitting cities to determine for themselves the form of government that they would have. Out of it all came

too, a variety of alternative methods of providing cities with charters, and five now employed may be briefly described (1) the special charter system, (2) general charter system, (3) the classification system, (4) the home rule system, and (5) the optional plan The five, however, are not mutually exclusive, sometimes two or three are found operating side by side in the same state Thus, whereas New York long had only the classification system, her constitution and statutes now sanction the home rule and optional plans as well Naturally, the form and character of a city s government will depend largely on who makes its charter and what is put into the document

1 Special charter system

Where the special charter system prevails, as it still does in New England (except Massachusetts) and in Delaware, Maryland, Georgia Florida, and Tennessee, each city has its own individual charter, granted by separate legislative act, and there may be as many more or less different forms as there are cities The plan has the advantage of potentially affording every city a chance to obtain the style of government and the corporate powers which it deems best suited to its size and needs but on the other hand is seriously defective in giving the legislature practically a free hand at all times to interfere in the affairs of a municipality, as by creating or abolishing offices at the behest of local political factions or machines or by transferring duties from elective to appointive officials or *vice versa*

2 General charter plan

The general charter system arose in reaction against legislative abuses associated with individual charters For the diversity of the special charter plan it substitutes uniformity A single state-wide municipal code constitutes a common charter for all cities, and all presumably have the same form of government and corporate powers The plan has the obvious merit of simplicity, and, in theory, it reduces the legislature s temptation to tinker with local government machinery Even the most perfect municipal code, however, will need amendment from time to time, and experience shows that one city or another will constantly be finding some change essential to its welfare, with special legislation, and even downright legislative meddling, therefore persisting Even so, there still is an excess of uniformity If, as often happens, a state contains cities varying widely in size, or if some are inland and others on a coast or important waterway, it is difficult, if not impossible, to frame a general code that will satisfactorily meet existing needs all around, and only a few states have undertaken to do so

3 Classification system

A compromise between the foregoing systems is classification of the cities of a state according to population, with a different style of charter provided for each of three or more classes (in Pennsylvania four) Each class may be given any corporate powers and form of government the legislature desires, but whatever is granted to a class must be shared by all cities included in it On the one hand, there is greater leeway in dealing with cities than under the general charter plan, on the other, there is supposed to be no discrimination against, or in favor of, a particular city,[3] which is the particular vice of the special charter system

[3] Unless as sometimes happens a class contains but a single city *e g* Milwaukee under the Wisconsin system

Like most compromises, the plan of classifying cities is not altogether satisfactory Cities of the same class, even when approximately equal in population, seldom have exactly the same local conditions, and therefore require different governmental arrangements and corporate powers and responsibilities Cities, also, as they grow in population, may pass automatically from one class to another, and thus be forced to change their scheme of government and to assume new burdens and responsibilities against their will Moreover, where classification is not definitely determined in the state constitution legislatures sometimes have resorted to ingenious and minute subdivision of classes, making it possible to enact special legislation, however disguised, for a single city And where such practices persist, and are sustained by court decision (as for a long time they were in Ohio), constitutional prohibitions of special legislation are in effect nullified

4 Home rule plan

The home-rule method of charter-drafting has at one time or another been constitutionally authorized in no fewer than 21 states, in six more, the legislature has granted broad authority to some or all cities to amend their charters or adopt new ones, and, in all, over 600 cities and villages are now operating under home rule charters, including 15 of the 30 largest ones in the country The primary idea is that, inasmuch as the inhabitants of a city are the people most interested in and directly affected by their municipal government and administration, they should have a right to draft their own charter and embody therein whatever plan of government they prefer, as well as to exercise all corporate powers not inconsistent with the constitution and general laws of the state Each city therefore is permitted to make and adopt its own charter if it wishes to do so, just as each state is free to adopt its own constitution and to put therein whatever it sees fit—so long, of course, as the charter transgresses no provision of the national or state constitution or of law, and limits itself to matters of purely municipal, as distinguished from state wide, concern [4]

Its advantages

The home rule plan has a number of manifest merits First, it enables the people of a city to have whatever form of government they consider best adapted to their needs and to formulate it locally rather than have it handed down to them by the legislature In determining, too, what is best adapted, they are free to experiment—with the results possibly becoming of interest and assistance to cities elsewhere Second, the plan benefits the state legislature by relieving it of the necessity of considering a multitude of local questions which it is poorly prepared to pass upon intelligently, even if it had unlimited time, and more freedom is thus gained for consideration of matters of importance to the state as a whole Finally, home rule may be expected to whet the interest of citizens in their own local government If things go badly, they have only themselves to blame, and if anything can inspire a lively sense of civic responsibility this, it would seem, should do it

[4] [illegible]

After all, however, it must be recognized that no plan for relaxing legislative controls ever makes a city entirely free Even under the most liberal home-rule system, locally-made charters are subject to general state laws, and the legislature, if it cares to do so, can find ways for encroaching upon municipal autonomy Often, too, there is no clear line of demarcation between things entirely local and those which, while perhaps primarily local, nevertheless transcend city boundaries and concern the people of other portions of the state Despite all, however, the home-rule system, wherever fairly tried, has considerably reduced unjustifiable legislative meddling in municipal affairs

No complete freedom

*An optional, or alternative, charter system has in later days come into favor in a number of states, and 16 (including Massachusetts, New York,* New Jersey, Ohio, and Wisconsin) now employ it, alone or in combination with other systems The plan introduces a sort of *a la carte* charter service by incorporating in the general law of the state several standard types of charter providing for different forms of government, including the commission form, the council manager form, and sundry varieties of the mayor-council form, and permitting each city to select for itself any form from the menu thus offered[5] With such flexibility, the plan has obvious advantages, and it is hard to see any serious drawbacks in it Designed to avoid the shortcomings of both a uniform municipal code and a special charter system, it at the same time does not permit the extremely wide freedom of the home-rule plan, and on this account it meets with favor among people who have some sympathy with the principle of local choice, yet believe straight home rule liable to serious abuse

5 Optional charter system

In whatever manner a city obtains its charter, its system of government will in practically every instance conform to one or another of three basic types (1) mayor council, (2) commission, and (3) council-manager The first is the historic and still predominant pattern, the other two are products of the present century

Three *standard* forms of government

## THE MAYOR-COUNCIL FORM—EXECUTIVE AND LEGISLATIVE BRANCHES

Once almost monopolizing the field, the mayor council form still is found in approximately three-fifths of all municipalities of over 5,000 population—in all 18, indeed, of over 500,000 except Cincinnati, O, Houston, Tex, *and Washington, D C, also, farther down the municipal scale, in numerous* smaller cities, villages, boroughs, and incorporated towns Based, too, on the classic principle of separation of powers, its most distinguishing characteristic is a sharp division of authority between an elective council and an elective *executive, or mayor*

Following federal and state analogy, municipal councils of earlier days, especially in larger cities, consisted almost invariably of two branches or

[5] A New York law of 1914 authorizes selection of any one of six standard types of charter, Massachusetts has a similar law allowing choice among five forms *and in 1950 New Jersey* authorized three basic forms with variations

1 The council

(a) Structure

houses No useful purpose, however, was served by such an arrangement, and many practical disadvantages developed, with the result that municipal bicameralism has now been very widely abandoned Not one of our 25 largest cities any longer adheres to it,[6] only 14 places of over 5,000 (with New York counted out) retain it,[7] and no municipality that has once discarded it has ever gone back to it Except in Illinois and a few other states, where the number of council members is by law graduated according to population, there usually is little correspondence between population and the council's size New York City has a council of 25 members, Cleveland of 33, and Chicago of 50, elsewhere the number runs from 20 or 30 downwards all the way to nine, even in cities as large as Detroit, Denver, Seattle, and Pittsburgh[8]

(b) Method of election

At one time council members were chosen almost invariably by districts, or wards each returning one or two representatives, and this still is a common method, especially where the council is large In practice, the ward plan however, has serious shortcomings, and most places with smaller councils have discarded it, substituting election on a general city-wide ticket giving every voter a voice in the selection of the entire membership This latter plan, too, has disadvantages, especially in cities of considerable size, and in not a few instances some combination of the two systems is found, a small proportion of the councilmen being elected by the city at large, leaving the majority to be chosen by wards Eleven municipalities elect not only by general ticket, but under a system of proportional representation[9] And while the term of members most frequently is two years, more progressive places are gradually going over to four Formerly almost invariably partisan, elections now are at least nominally nonpartisan in Chicago, Detroit, Los Angeles, and practically 57 per cent of all other places of over 5,000—more commonly, however, places with commission or manager than with mayor-council government

(c) Functions

To the council it falls chiefly (1) to adopt the yearly municipal budget, levy taxes, borrow money, and allocate funds to the spending offices and services, often in this way more or less controlling them, (2) to grant franchises to lighting, telephone, street railway, and other public service corporations, and (3) to serve as the municipal legislature for enacting amending and repealing local laws, known as ordinances, and commonly assertions in one way or another of the police power In the state municipal code, or in individual charters, the scope of the ordinance power is always set forth in more or less detail, and no council enactment is valid and enforceable

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unless clearly authorized or implied in some code or charter provision—and, of course, unless consistent with all statutes and all provisions of the state and national constitutions More and more, however, American city government has become a matter of administration rather than legislation, with corresponding decline of the council in activity and importance[10]

2 The mayor—"weak" and "strong"

In earlier days, when popular suspicion of strong executives still lingered, municipalities had a mayor as head of the executive branch but trusted him with little authority He could make but few appointments, and only with council approval, if he had a veto at all, it could rather easily be overridden, and management of the municipal services was largely in the hands of departments, boards, or commissions subject to little mayoral control In other words, under this 'weak mayor' plan, the city's chief executive was in pretty much the position in which the governor still is found in many states—and with the same bad effects upon unity, economy, and efficiency In more than half of all mayor council cities (mostly smaller ones, but including such larger ones as Chicago and Los Angeles), this weak mayor arrangement persists In others, however, the mayor has been given considerably more authority, and some, *e g*, New York, Boston Cleveland, and Detroit, have gone over unreservedly to a "strong mayor" type, in which power of appointment and removal is substantially increased, the veto power strengthened, *and control over administration expanded and integrated And although* numerous other municipalities still present only varying compromises between weak mayor and strong mayor types, the office has been distinctly on the upgrade,[11] with the council losing ground In cities retaining the mayor-council form at all, reform movements have rightly been aimed principally at making the mayor actual as well as nominal head of the municipal government, and responsible for unified management of affairs

(a) Election term salary

American mayors are uniformly chosen by direct popular vote[12]—not by the council, as in Europe—but sometimes on a partisan ballot, and sometimes otherwise Terms vary from one year in some smaller cities, especially in New England, to six years, in larger places (including 11 of 16 mayor-council cities of over 500 000 in 1950), it is almost always four years, elsewhere it most commonly is two Salaries vary also from mere nominal sums in smaller places to $12,000 in Philadelphia, $18 000 in Chicago, $20,000 in Boston, and $40,000 in New York—the figures in the last three cases equalling or exceeding the governor's salary in the respective states

Powers and duties

From what has been said about the varying and transitional position of the mayor in our mayor-council governments, it will be manifest that no

[10] Moreover the legislative authority of a city is not vested exclusively in the council Certain administrative bodies such as the board of health and the fire department—even single officers—often are empowered to prescribe rules within their respective fields of jurisdiction Such rules are called regulations in order to distinguish them from ordinances But they generally have the same legal aspect as ordinances are subject to the same restrictions, and are

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single generalized statement of powers and duties is possible A few broad facts, however, may be indicated Everywhere it falls to the mayor to represent the city in its dealings with other municipalities and on ceremonial occasions, and everywhere he is expected to promote enforcement of the council's ordinances, to see that public order is maintained, and in general to cooperate with the law enforcing authorities of county, state, and nation Everywhere, too, as chief executive, he is supposed to exercise some supervision over the work of the various city departments How effectively he can do this, however, depends on the amount of authority with which he has been endowed, and especially on his power of appointment and removal The tendency has been to confer more independent power at these latter points Nevertheless, in the great majority of cities appointments (and often removals also) still are contingent on approval of the council, and especially where removals cannot be made independently, the effect is to lessen responsibility for efficient conduct of administration

Considerable growth of mayoral authority has come also in connection with budget making In earlier times, this function commonly belonged to the council exclusively and in some cities it still does so, being exercised as a rule through a council committee In Boston and an increasing number of other cities, however it has been vested in the mayor alone, and in some places where this has not been done more opportunity has been given him to share in it, at least in an advisory capacity Finally may be mentioned the mayor's relation to municipal legislation, *i e*, ordinance-making In most cities he presides over council meetings and convokes special sessions Everywhere he transmits recommendations (by formal message or otherwise), along with reports of department heads or of other officials And in approximately three fourths of all mayor-council cities he has power to veto (sometimes extending to veto of items), although nearly always a veto can be overridden in the council by a two thirds vote—increased in some strong mayor cities to three fourths, or even five-sixths [13]

## DEFECTS OF THE MAYOR-COUNCIL SYSTEM

1 Fundamental

The mayor-council form sometimes is referred to as the federal type of city government, because at a number of points its organization bears obvious resemblance to that of the national government Whatever its merits on the federal level, however separation of powers has grave disadvantages on the municipal level Legislative authority is shared by the council and the mayor, and each may, with some show of right, maintain that ultimate responsibility rests with the other In administration, likewise, authority is often clumsily

[13] Other principal municipal officers usually include a clerk a treasurer and a city attorney often serving on a part time basis in smaller places but in larger ones full time and with staffs of subordinates Charged with keeping records issuing licenses and permits and sometimes with managing elections the clerk is in some places elected by the council in others by the voters Collecting caring for and disbursing city funds the treasurer is usually either popularly elected or appointed by the mayor As law officer the city attorney advises the council mayor and other officials on legal matters represents the city in the courts drafts ordinances, prepares contracts or approves them for form and in some cities prosecutes violators of local ordinances In many larger places he is appointed by the mayor in smaller ones he is likely to be chosen by the council or by the voters

diffused and responsibility scattered Administrative functions are placed in the hands of a group of officials separate and distinct from the legislative body, and formal contact between the two arises only when the council is called upon to confirm the mayor's appointment of a department head, to vote the annual appropriations, and to pass ordinances creating, reorganizing, or abolishing departments Because of their joint participation (usually) in the selection of department heads, the mayor and council divide responsibility for efficiency or lack of it in the city's administrative services—a situation aggravated by the fact that while, as a legislative body, the council has no legal right to meddle with the details of administration, in practice few city activities are found wholly outside the sphere of councilmanic influence, since the council alone can provide the money for carrying them on

2 Incidental

The defects mentioned seem to be inherent in, and hence more or less inseparable from, the system of checks and balances, "another name for which is friction, confusion, and irresponsibility ' In addition however, there are shortcomings which, although not fundamental and inherent, are almost as universally associated with the mayor-council form In the first place, the council often is a far larger body than is needed for representing the various elements in the city and transacting the city's legislative business satisfactorily Where the bicameral plan persists, the division of authority and responsibility is carried farther still, and the ordinary citizen usually is completely in the dark as to who is to blame for what passes the council or is smothered in committee In almost every mayor-council city, but of course especially where the weak mayor form prevails, there also is an unnecessarily large number of elective officers having purely routine functions—all, or practically all, minutely prescribed by state law or city ordinance To these defects, too, must be added drawbacks arising from the still widely used ward system of electing council members, from their nomination and election frequently under a cumbersome and expensive partisan primary and election system, from the usual lack of any method of quickly removing unsatisfactory officials, from the people's inability to secure desirable ordinances if the council fails to enact them, and, on the other hand, their lack of any popular veto upon legislative acts regarded as detrimental to the best interests of the community

Reformed mayor council government

Not a few cities, attributing the unsatisfactory nature of their government merely or mainly to these incidental defects, have simply lopped off one or more of them, or, more rarely, have attempted to graft upon the old stock some of the newer political devices Thus, many have (1) reduced the size of the council and the number of elective officials, or (2) abolished one branch of a bicameral council, or (3) replaced the ward system with election at large, or (4) discontinued partisan primaries and substituted nomination either by petition or by nonpartisan primary, or (5) given the mayor independent appointing power, or (6) authorized popular referenda on all franchise ordinances, or (7) provided for the popular initiative and referendum in connection with other ordinances, or even (8), in a few instances, adopted the recall Such piecemeal reforms, too, often have yielded wholesome results But they do not go to the root of some of the most serious municipal ills

## THE COMMISSION PLAN

Origin and spread

Recognizing this fact, some 760 cities of over 5,000 population (and more than 300 smaller ones), starting with Galveston, Texas, in 1900 and Des Moines Iowa, in 1907, have discarded the old doctrine of separation of powers, and in place of the time-honored mayor-council system have adopted either a commission or a council manager form of government At its maximum, the number of commission governed municipalities was not far from 500 Later, many (including Des Moines itself in 1949) shifted to the council manager system, and some (*e g* Buffalo in 1927) changed their minds and went back to mayor-and council In 1950, however, 336 places of more than 5,000 population retained the commission plan—usually smaller cities, it is true, but including Jersey City, Newark, Memphis, Birmingham, Omaha, St Paul, Portland (Ore ), and New Orleans

Essential features

The commission plan is remarkably simple In place of a bicameral council or a large and unwieldy single chamber, in place of a mayor and a council each having some of the powers belonging primarily to the other, and in place of theoretically separate and independent legislative and administrative branches, one finds a small commission, consisting usually of five full time salaried members elected on a general ticket, and made conspicuous by their limited number and the elimination of practically all other elective municipal offices, and in this commission is concentrated all of the legislative, and most of the administrative, authority of the city government As the legislative body, the commission has the ordinance power possessed by the council in mayor council cities, including the right to fix the tax rate and pass the annual appropriation bills As an administrative body, it exercises all of the administrative authority which in mayor-council cities is shared by the mayor, administrative departments, and council Each member serves as head of one of the five departments into which the administrative work usually is divided, and appointment of subordinates in the departments may be made by the commission as a whole, but is likely to be intrusted to the respective commissioners individually as department heads, with or without the assistance of a civil service commission

Incidental features

The foregoing constitute the *essential* features of the system In addition however, certain incidental features almost invariably appear The ward system has almost everywhere been abolished, with the commissioners therefore elected from the entire city—an arrangement helping to make the position more eminent and attractive Candidates generally are nominated either by petition or by nonpartisan primary and voted for on election day on a nonpartisan ballot With such extensive powers vested in a small group, it is wise, also, for the public to retain means of direct and prompt control, and to this end, provision usually is made (outside of Pennsylvania) for recall of an unsatisfactory commissioner in a special election held before the expiration of his term Often, too, the initiative and referendum supply additional safeguards In varying degrees, all of these devices have contributed to the improved civic conditions which usually have followed adoption of the com

mission plan It should, however, be clearly understood that none is either essential or peculiar to commission government, and that any mayor council city can make use of any or all, as some do, without adopting the commission plan

The mayor under th commis sion form

In almost all cases, a mayor still is provided for—as a rule one of the commissioners designated for the office by popular vote, although in a few cities the commissioner who receives the highest popular vote automatically becomes mayor, and in New Jersey and Nebraska, the commissioners select a mayor from their own number In any event, far from being the overburdened mayor found in some cities, the commission government mayor is traditionally little more than first among equals Commonly he wields no veto power, usually he has no appointing power *as mayor* and almost never does he have any general power of removal To be sure, he is the nominal head of the city government, and on ceremonial occasions he serves as such But of actual authority, he usually has little or none beyond that of his colleagues

The plan s defects

The rapidity with which the commission plan took hold in various parts of the country after 1907 testified to the need of city government in that day for regeneration, and as the system continued displacing cumbersome and wasteful mayor-council arrangements in scores of smaller and middle sized places benefits of many kinds resulted—even though often it was not easy to determine how much of the improvement arose from the system s inherent virtues and how much rather from the awakened civic consciousness usually going along with its adoption As experience accumulated, however, various shortcomings appeared, and, after trying the plan, several cities reverted to the mayor council form, while a far larger number turned to the still newer council manager plan New adoptions of the commission system, have, in fact, become rare, and large as has been its contribution to the general sweep of municipal improvment in this country in the past half century, its role, except in smaller cities, seems likely to be a diminishing one No city of the first magnitude ever has adopted it, and for such cities it generally is regarded as ill adapted

1 Inade quate repre- sentative basis

Three faults of the plan call for mention The first is that a commission of five, or even seven is (or at least is likely to be considered), for middle sized and larger places, inadequate as a municipal legislature Even if election is by general ticket, various sections of a larger city will think themselves unrepresented different major interest groups may have no voice, and while city councils of the old type frequently are too large, the policy determining function as exercised through ordinance making, probably should be more broadly based than in the typical commission

2 Di vided control over ad ministra tion

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this, it is an improvement on what preceded it—or would be but for the error of putting policy-formation and policy execution in the same hands In the administrative field, however, it leaves control to a five headed agency, and hence does not carry integration to its logical conclusion What

unsupplied is an apex to administration which will insure unity, teamwork, and proper gradation of authority—qualities as essential to efficient administration as is individual expertness

3 Inexpertness of commissioners as administrators

On the administrative side, there is also another shortcoming Where (as is true in a good many cities) commissioners are voted upon by the people as candidates for particular commissionerships carrying with them the management of specified departments, it might be presumed that the persons elected would have special qualifications and aptitudes for operating the departments over which they find themselves placed Most commissioners, however, are not elected to take charge of specified departments, and even where they are the presumption mentioned by no means always conforms to fact—the more by reason of the circumstance that with all functions compressed into only five or some other small number of departments, each commissioner usually must take care of such a variety that no one could be expected to be skilled in all Most of the time, a commissioner gets a particular department only because he sees some advantage in having it, or because it is the only one left after the others have been picked off, or simply because he is arbitrarily assigned to it The result is that, by and large, commissioners are not only (at least initially) inexperienced in administrative work generally, but utter amateurs in their own departments—yet placed in positions presupposing thorough knowledge not only of such matters as personnel management, but of police administration, street construction, fire protection, or even public health If the city is so situated as to be able to afford adequate technical experts in the departments, things may go well But if lay commissioners, chosen by political processes, must personally carry on the work of such departments as health and public works, the results may leave much to be desired

## THE COUNCIL-MANAGER SYSTEM

With a view to remedying the defects of commission government without sacrificing all of its advantages, a modified form has been devised under the name of the council manager system Introduced first (among larger cities) in Dayton Ohio, in 1914, this newer plan proved its usefulness there, and then was taken up elsewhere, until early in 1951 it was found operating, either by charter or by ordinance, in more than 1,000 cities, many of them small, but 38 per cent of them places of between 50,000 and 100,000 population[14]

Essential features

1 The council

Under the council manager form, there continues to be an elective council, but always a small one, in about three fourths of all manager cities, its members number five, as usually under the commission plan, and where the number is larger, it rarely exceeds eight (as in Kansas City) or nine (as in Cincinnati) Furthermore, the council has, in general, the functions of the commission

[14] Among even larger places included are Oakland San Diego and Long Beach Calif Hartford Conn Miami Fla Atlanta Ga Wichita Kan Des Moines Ia Cambridge Worcester and Lowell Mass Flint and Grand Rapids Mich Kansas City Mo Rochester and Yonkers N Y Cincinnati Dayton and Toledo O Oklahoma City Okla Dallas Houston and Ft Worth Tex and Richmond and Norfolk Va For a complete list of the 1 000 or more see the most recent edition of the *Municipal Year Book* (Chicago)

or council in a commission governed municipality except in administration—and except also for the very important function of choosing the manager It enacts ordinances, levies taxes, votes appropriations, authorizes borrowing, grants franchises creates and abolishes departments, investigates the financial transactions or official acts of any officer or department—in short, serves as the supreme policy determining and general supervisory authority of the city Restricted, however, to these functions, it devotes only limited time to the city's affairs (rarely meeting more than once a week, and frequently not oftener than once in two or three weeks), and its members are paid only nominal sums for their services

2 The manager

The distinctive feature of the system is its provision for administration *Under the mayor-council plan, administration is carried on in departments* subordinate to the mayor, but with control diffused between that official and the council, and under the commission plan, it is vested in the commission and exercised through departments distributed among the commissioners Under the council manager plan on the other hand the entire job of admin [illegible]

corresponding to the stockholders, the council corresponding to the board of directors chosen by the stockholders and charged with general responsibility for the conduct of the business and the city manager corresponding to the superintendent or general manager chosen by the board of directors, responsible to it and charged with looking after all details [15]

The manager's functions

As the most conspicuous official in the city government and the one around whom all administration revolves the manager has many and exacting duties

1 With the exception of the city auditor or comptroller, the city attorney, and sometimes the city clerk (all usually chosen by the council or even by the people), he appoints city officials—heads of departments and usually higher subordinates—*with no power in the council to confirm or reject He also can independently sus* pend or remove

2 As the city s chief executive he sees to the enforcement of all local ordinances and likewise of such state laws as the city is expected to administer

3 He supervises and in so far as necessary directs all administrative work as carried on in the various departments

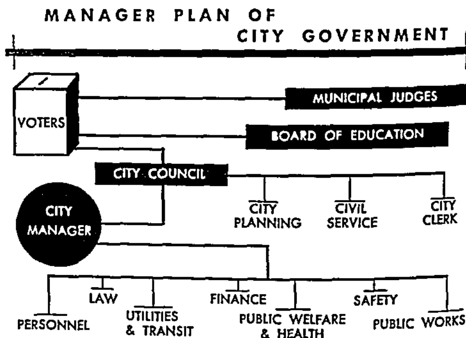
4 Only the council representing the taxpayers can adopt the municipal budget But it is the business of the manager not only to keep the council informed on financial conditions and needs but also to prepare the budget for council consideration and to explain the significance of its various items

5 As the connecting link between the legislative and administrative branches [illegible]

tion and advice

[15] Often under the council manager plan there still is a mayor who may be chosen by the [illegible]

Members of the council are expected to refrain from meddling with administrative activities and from attempting to influence the manager in selecting department heads, awarding contracts, and the like This they do not always do But properly the council's functions are exhausted when it has picked a good man for the manager's job, set up adequate machinery with which he may work, laid down any broad lines of policy that it wants to see followed, provided the necessary funds, and placed itself in a position to keep informed on what the manager is doing and to avail itself of the information and advice that he can give




Qualifications and selection of managers

The foregoing enumeration of managerial functions and duties carries obvious implications regarding the qualifications that a city manager should have In all cities employing the plan, the council makes the selection, appointment usually is for no definite term the understanding being that an incumbent will be retained as long as he gives satisfaction, and in any case the salary is fixed by the council usually at whatever figure it becomes necessary to pay in order to obtain the person desired Manifestly, the manager must be a man of energy and of demonstrated executive ability, he must be skillful in dealing with people yet interested in administration rather than in politics, and of course it is desirable that he shall have had previous experience as a manager, presumably in some smaller city, or in any case as a mayor, council member, or other municipal official He need not be an expert in any one branch of municipal activity, *e g*, public works or public health But he must have at least some acquaintance with all branches and an intelligent appreciation of the importance and interrelations of all

One of the questions that a council always has to face in making an ap

pointment is whether to pick a local man or an outsider A local candidate may be expected to be more familiar from the outset with the affairs of the given city and with what local sentiment expects of the city government, and such local sentiment may strongly disapprove bringing in a "foreigner" If, however, these considerations are allowed to prevail, the result may easily be the selection of some local politician for no better reason than that he has corralled the necessary number of council votes, and while the bulk of appointees thus far have been local products, it is gratifying to observe that in an increasing number of instances councils have been wise enough to search the field for the best material that could be turned up from any quarter of the country The city managership has come to be a profession, followed by several hundred experienced people, and nearly always it is possible for a wide awake council to establish contacts with a number of men who have made reputations as successful managers, moving up perhaps a number of times from smaller to larger municipalities, and thus to procure a manager who, it is true, will be unfamiliar with the particular city when he begins, but will have experience and "know how' enabling him quickly to orient himself and start off with little loss of momentum

Results *achieved*

As the steadily lengthening list of council manager cities suggests, the manager plan has come to stay and is rapidly superseding the mayor-council, and especially the commission, system Thirty-seven cities that have tried it have given it up (four of them later went back to it), the most conspicuous being Cleveland But usually where this has happened the step was taken because politics had been allowed to scuttle the system, or for other reasons not reflecting on the plan's intrinsic merits In scores of cities, administrative personnel has been improved, better business methods have been introduced (especially with respect to purchasing, accounting, and awarding contracts), budget making has been placed on a more scientific basis, debts have been reduced and expenditures held within the limits of revenues, politics of the baser sort has been eliminated from administrative planning and operation, and general administrative efficiency has been promoted As in the case of commission government, not all of the credit goes to the plan as such, some of it is due the awakened civic interest which usually has led to adoption of the plan in the first place But certainly the managership has in plenty of places demonstrated its very great merits [16]

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[16] In general the plan seems best adapted to cities of moderate size Very small places may not have a tax base broad enough to support it and very large ones offer difficulties of other sorts The present list however contains places of from under 1 000 to almost 500 000 population

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# CHAPTER 45

## Municipal Functions and Administration

*The city as a corporate business enterprise*

In every municipality, laws (ordinances) are passed and enforced, justice is administered, taxes are levied, and other acts of a governmental nature are performed Most of the laws applying within a city's boundaries, however, are of state or national rather than local origin, most of the courts that sit in its public buildings are state or national also, even taxes gathered are likely to be shared with county and state, and the things that chiefly make a city important to its inhabitants are of a different sort For what the city mainly does is to provide the people with services—streets water sanitation, schools, hospitals, fire protection, police, airports, and the like—calling not primarily for operations of *government* in the stricter sense, but for *management* very much as if the city were, as indeed it truly is, a corporate business enterprise The objectives are, of course, not the same as in private business Not profits, but service, is the aim And while in purchasing supplies, awarding contracts, and hiring laborers, none except good business methods should be employed, in fields like education, recreation, public health, and public welfare, there commonly must be regard for what the people want and demand, even though providing it may not be 'good business"

In a single brief chapter, it is possible to touch upon only certain major municipal functions as follows (1) police, (2) fire protection, (3) health and sanitation, (4) public welfare, (5) education, (6) public works, (7) public utilities, (8) planning and zoning, and (9) finance [1]

### POLICE ADMINISTRATION

*A principal municipal function*

Foremost among a city's obligations to its inhabitants is protection of life and property, and to perform this function there sometimes (especially in smaller places and under commission governments) is a single department of public safety, but more often a division of labor between two separate departments of police and fire protection Under our federal system, responsibility for 'law and order" rests primarily with the states, and some states meet it in part by maintaining limited police forces under their sole control By and large, however, the policing of counties falls to sheriffs and their deputies,

[1] Current developments in the entire field are reviewed from year to year in the *Municipal Year Book* published at Chicago by the International City Managers Association.

of small towns to constables, and of cities to municipal officials and forces—in all cases legally executing the law enforcing authority of the state, but locally selected, organized, paid, and controlled

The police department

When organizing a municipal police department, it used to be customary to place at the head a board appointed by the mayor and confirmed by the council, and in many cities still operating under antiquated charters this practice persists Almost more than any other, police administration, however, calls for quick decision and positive action, substantially as in an army, and all of our largest cities, together with a fair number of those of second rank, have shifted to the plan of a single head Even with this done, there still are questions Should the head be a police chief, probably a professional member of the force who has risen from the ranks, and in immediate command of the force? Or should he be a lay police commissioner or marshal superior to the chief? In commission-governed cities, the head is, of course, the commissioner in charge (usually) of the department of public safety, in many mayor-council municipalities, there is a police commissioner appointed by the mayor, in some manager cities, the same arrangement exists, with the manager appointing although in many no official is interposed between the police chief and the manager—and this appeals to most students of the problem as the best solution

In any event, the police chief, in a municipality of size, heads up an administrative structure organized on quasi-military lines and commonly in four main divisions—a patrol force, a detective force, a traffic squad, and a 'housekeeping" unit (preserving records, caring for property, and managing personnel), with auxiliary units dealing with vice repression, crime prevention, and other specialized activities To cover the area of a sizable city, police precincts, each with its station house, are established and grouped in divisions reporting directly to the chief Personnel is graded as deputy chiefs, captains, lieutenants, sergeants, and patrolmen, and to keep operations going 24 hours a day, three shifts of eight hours occupy as many different platoons

Police forces

In terms of full time employees, municipal police forces range from 20 or 30 in places of from 10 000 to 25,000 to small armies of over 5,000 in Philadelphia, 7,900 in Chicago, and 19,000 in New York The majority, of course, are patrolmen, the backbone of the force, and upon their efficiency largely depends the quality of the entire establishment Formerly it was common for positions on the force to be distributed freely by the dominant party or faction as rewards for political services In a substantial majority of places of over 10 000, however, as well as in some smaller ones, the force now is on a merit basis covering not only appointments but also promotions and often with pension systems attached Many large merit system cities moreover, maintain schools in which recruits receive training for both regular and specialized duties, and police administration has become a subject of study not only in such schools but in several universities

Police functions

Even in a city of but moderate size, the police have many things to do First and most important is patrolling the streets, day and night, on foot on motorcycles, and in one man or two-men 'prowl cars," for the detection

and prevention of crime and other offenses, whether in violation of city ordinance, state law, or federal law, and this requires the bulk of both man-power and equipment, with sometimes specialized patrols for a water front or other district presenting special problems Going along with patrol duty is, of course, the arrest of offenders and the gathering and preservation of evidence A second major function is the handling of street traffic and of exceptional throngs of people, and for this purpose a special mounted or motorcycle squad may be necessary Then there is the vital matter of detecting and apprehending criminals whose identity, or at least whereabouts, is unknown, and this will enlist the services not only of detectives and plain-clothes men, but—in larger cities—of a highly specialized bureau or division of criminal investigation Everywhere, too, but especially in larger cities, is the duty of crime prevention, with juvenile delinquency a main problem, and at this point policewomen enter the picture, since they are peculiarly qualified to work with children, advise parents, watch dance halls and other places where youth congregate, and maintain helpful contacts with social service and recreational agencies

**The problem of police integrity**

Finally, in many cities there are the extremely troublesome tasks of (1) repressing lawlessness associated with gang warfare and with different forms of 'racketeering," and (2) enforcing laws for upholding public morals From this latter function arises, too, the circumstance that no branch of municipal administration offers more opportunities for corrupt influences to make themselves felt than does the police force of a large city, and the further unhappy fact that in practically every startling revelation of corruption connected with city government the police have been more or less implicated Temptation to favoritism collusion, and graft besets the department s personnel on all levels, every lawless element deriving profit from its activities is prepared to share its ill gotten gains with the police in return for immunity from prosecution, and possibilities of misconduct become especially grave when the police are expected to enforce laws not supported by sentiment or moral standards in the community, as sometimes happens in the case of statutes or ordinances prohibiting the sale of liquor, or gambling, or the social evil, or requiring Sunday-closing of stores, theaters, and other places of business or amuse ment Despite lapses here and there, police establishments by and large un doubtedly may nevertheless be credited with integrity

**Relations with local courts**

To all intents and purposes, even though not in form, the local criminal, or police, courts in which offenders are tried—provided for either in the city charter or in general state laws—are a part of the police system, certainly the spirit and methods of police court magistrates or judges, their fairness, tactfulness, and integrity, go far toward determining the effectiveness of the local police administration Such judges usually get their places by popular vote, which in reality sometimes means that their selection is determined largely by political bosses and organizations supported by elements ready to pay for immunity from law enforcement, and because of unfortunate resulting experiences, popular election has been abandoned in New York and some other cities, where police magistrates now are appointed by the may

somewhat more satisfactory results In the past two decades, also, considerable progress has been made in differentiating between various classes of offenders and providing special courts for dealing with each class For example, many, if not all, of our larger cities now have juvenile courts for cases involving youthful offenders, and there often are also morals courts, domestic relations courts, and even speeders' courts

## FIRE PROTECTION

*Fire departments and forces*

A few decades ago, paid professional fire departments existed in only the largest cities, with fire fighting elsewhere left to unpaid volunteer bands of citizens armed only with leather hose, buckets, and hand pumps Now all is changed, any city, large or small, without a professional, paid, adequately equipped fire department is regarded as decidedly backward As in the case of police, there still are places where a board or a committee of the council is in charge Under commission governments, however, fire protection is bracketed with police under an elective single commissioner of public safety, and nearly everywhere else there is also a single head, either a fire chief or a fire marshal directly in command or a lay commissioner intermediate between the chief and the mayor, manager, or other appointing authority In large cities, the department will contain special units dealing with the fire alarm system, fire prevention and fireman training But in any case, except in places of 25,000 or less the basic pattern will be a system of fire districts or precincts covering the city, each with a fire company operating with full equipment, from a fire station serving as headquarters, and in large places with company commanders usually grouped under sub-chiefs Like police protection, fire protection must be available around the clock, and consequently the force operates in platoons, or shifts, most commonly two, each with one day on duty and one day off, but sometimes three, each serving eight hours a day As also in the case of police, personnel is widely recruited by merit procedures, yet with spoils still dominant in too many places, and often larger cities, like New York, Chicago, and Pittsburgh, have training schools for recruits

*Functions*

*1 Fire fighting*

The primary function of a fire department is, of course, to fight, check, and extinguish fires when they break out, and for doing this American firemen have at their command equipment and facilities far surpassing any ordinarily to be found in European cities Huge pumpers (a pumper company is the basic fire-fighting unit), ladders extensible to great heights by mechanical power, water-tower trucks, turret pipes, "fog trucks" carrying equipment for smothering fire with fine spray, asbestos clothing, two-way radio communication, special high pressure water mains serving areas containing tall buildings—these are only parts of the apparatus available in large cities, while even in small ones, there has been great advance since the old horse drawn "fire engine" used to go clanging down the street

*2 Fire prevention*

Despite all this, the annual fire loss in the United States is shockingly heavy —an estimated 10,000 deaths, twice as many serious injuries, and in terms

of money, more than $500 million (in 1948, some $725 million, the highest on record) With inferior means of fighting conflagrations, Europe suffers far less from them (in peacetime), partly because less inflammable building materials are used, but partly also because of other precautionary measures, and American cities, too, in the past two or three decades have been waking up to the truth of the old adage that an ounce of prevention is worth more than a pound of cure Through their National Board of Fire Underwriters, insurance interests look anxiously into the facilities of cities not only for fire fighting but also for fire prevention and advise with the proper authorities, city councils fix areas within which inflammable buildings may not be erected and prohibit structural arrangements favorable to the spread of fire, and fire departments frame regulations and (often with police assistance) carry on inspections, usually indeed in larger cities maintaining a fire prevention bureau or other unit specially charged with such activities Fire hazards often thus have been reduced and the public stimulated to greater precaution, although for overcoming the still too prevalent inclination of Americans to take chances where fire is concerned, a good deal more education seems required

## HEALTH AND SANITATION

*Interdepartmental aspect*

Few, if any, municipal activities contribute more to the public well being than does the work of the department (whatever called) charged with protecting the people's health Few departments, too, are so interlocked functionally with others, for whatever is done or not done by the agencies in control of water supply and purification, street cleaning and sewerage, garbage collection and disposal—likewise police enforcement of sanitary measures and the board of education s arrangements for medical and dental inspection of school children—is manifestly of concern to health authorities In no field *is harmonious cooperation more urgently needed, in none is it sometimes* more conspicuously lacking

*Organization*

In commission governed cities, health protection usually, and not illogically, is bracketed with police and fire administration in the department of public safety Elsewhere, especially in larger places, there is likely to be a separate department of health, with sometimes, as in New York, a board in charge, but nowadays more often, as in Chicago a single full time commissioner—in any case appointed by the mayor or in council manager cities by the manager Even where the board plan persists, the executive officer and actual head invariably is a professionally trained commissioner, and everywhere, in larger places, that official heads up a more or less elaborate and specialized health administration operating through bureaus or divisions of sanitation, foods and milk, communicable diseases, child hygiene, industrial hygiene, and the like, and enlisting the services of a large array of medical officers, sanitary engineers, sanitarians, clinicians, nurses, inspectors, and other employees Smaller places, considering that they cannot afford such a set up, frequently leave public health matters to be attended to by a designated physician devoting most of his time to private practice, and of course in such situat

is done may leave a good deal to be desired [2] Back of all local health authorities, it must be remembered, stands the state board of health, whose usually extensive rules and regulations must be carried out, and whose inspections, investigations, and special efforts in time of epidemic must be loyally supported Sometimes, indeed, local health officers are appointed, controlled, and removed by the state health department

Functions

In times past municipal health departments concerned themselves almost wholly with discovering and abating nuisances and with fighting epidemics that often need not have occurred Nowadays, effort is focused far more upon preventive measures made possible by advancing medical and sanitary science Vital statistics are gathered and compiled to afford a continuous picture of the state of the community's health, inspections of water and milk supply and of every establishment and operation through which articles of food reach the consumer, are carried on, communicable diseases are quarantined and emergency orders issued, campaigns of health education are carried into homes schools, and factories, and a watchful eye is kept—or is supposed to be—upon the activities and services of all other departments where public health interests are, or may be, at stake

## PUBLIC WELFARE

Throughout most of our history, public welfare as a governmental function distinguished from sanitation and health, education, and police and fire protection (which certainly also are welfare activities) included little beyond relieving the poverty-stricken, either on an "in door" basis in almshouses hospitals, orphanages, and other institutions or by the "out door' means of food, clothing, fuel, and money furnished the indigent in their homes or the homes of relatives The reasons for poverty—physical handicaps, mental illness, moral deficiencies, or strokes of ill fortune—made little difference, relief was granted, not because of any legal right to it, but as an act of charity, even generosity, and government was obligated only to the extent that churches and other private agencies proved inadequate to the task

An expanding function

The past 20 years have seen a great broadening of these concepts The depression of the thirties threw millions of normally self supporting persons out of work, relief rolls mounted to almost incredible proportions, desperate expedients of local, and even state, governments broke down, with the national government compelled to come to the rescue with bold measures And realization deepened, not only that poverty would in future have to be dealt with far more adequately, but that many forms of public welfare previously neglected would have to be taken in hand, that the rôle of government in this field would have to be greatly and permanently expanded, that different forms of amelioration would have to be devised for different cate

Los Angeles county health department.

gories of people, and that promoting welfare should be regarded no longer as merely a matter of generously inspired philanthropy, but as betterment and security to which people, as human beings and as citizens of a rich nation, have a moral, if not also a legal, right From these newer ideas have sprung many of the widely varied forms of public, or social, welfare administration now found in every part of the country

Extent of municipalization

Under earlier conditions, public welfare, as a matter of poor relief, was mainly a municipal function, although sometimes the county cooperated, or even carried the load Today, the situation is considerably mixed In many instances, not only various specific forms of welfare but general over all responsibilities rest entirely with the county, under state supervision, and the city has few if any activities of the kind In other instances, certain forms are cared for by the county, or perhaps by other state agencies, but the city remains in general charge of everything else In still other cases, including most large cities and especially city counties, cities have some specific, and also general, responsibilities, with often a wide field to be occupied

*In the over all picture, however, one finds that*—*with the old age* assistance, aid to dependent children, aid to the blind, and unemployment compensation programs under the federal Social Security Act of 1935 administered almost entirely through state and county agencies—the city's function becomes simply that, at the core of general assistance or relief (indoor or outdoor, and usually financed in part by state grants in aid) for persons not sufficiently provided for by federal programs and by community chests—supplemented by numerous activities varying from city to city, and often closely related to public health, such as free employment bureaus, vocational guidance clinics, free legal aid for the poor, infant milk stations, day care centers for children of working mothers, visiting nurses in maternity cases, municipal lodgings, public baths and laundries, race relations units, city markets, facilities for public recreation, and other instrumentalities for advancing people s physical moral, and economic well being Arrangements for *administration vary, but nearly all municipalities except the smallest have,* under one name or another, a department, or at least a bureau, of public welfare, with often a welfare board operating through a director and a number of bureaus or divisions

## EDUCATION

Tendency to independent management

When the student of urban administration turns to the management of public education, he encounters a situation usually quite unlike that in the fields thus far surveyed For not only are educational activities among the oldest of local functions, and almost always the ones on which most money is spent, but in the great majority of cities education is not administered by the regular city government at all To begin with, in all states, public elementary and secondary education is not a local but a state function, in the *legal sense that (1) a state-wide* pattern of school organization, powers, and activities is prescribed by the state constitution and statutes, with the latter

often determining instructional programs and standards in considerable detail, and (2) school districts are state administrative agencies for locally carrying out state authority In the second place, while many school districts are coterminous (or substantially so) with cities of various sizes, in the great majority of instances school administration, as suggested above, is not a branch of general municipal administration, but an activity apart In somewhat over a third of all municipalities of over 25,000 (including New York and some commission governed cities such as St Paul), it is true, the school system is operated as an integral part of the city government Even here, however, it usually enjoys a good deal of autonomy, and in most larger places and nearly all smaller ones (except sometimes under the commission system) school administration is not a part of, but distinct from, general administration with an independent elective school board paralleling the elective council and frequently (although not always) with independent power to levy school taxes and employ school funds subject only to requirements of state law By and large, city councils are political bodies, and the prime objective in removing school affairs from their hands has always been to 'keep the schools out of politics Many students of government contend that there should be but a single budget, a single tax levy, and a concentration of popular interest upon one municipal governing body rather than a division between two But most school authorities, backed by a great deal of public sentiment strongly disagree, urging the menace of politics, the fear that the schools would come off with diminished financial support, and sometimes the consideration that desirable school areas (perhaps urban-suburban rural) by no means always coincide with city boundaries

School boards

Whichever situation is found in a particular city, there almost invariably is a school board If education is included within the general city government the board will have to operate as a department, or perhaps under a commissioner or other departmental head, and it will have no independent power to tax and considerably curtailed authority in other directions If however, education is administered separately, the board will become in effect a one purpose government, with larger freedom and power Where there is union rather than separation, the board may be appointed by the mayor (as in New York and Chicago) although it also may be elective, where separation prevails, election—almost always at large and on a non partisan ticket—is far more common Formerly, boards of up to 40 members were found, but the tendency has been to reduce the number, which now is seven in New York, 11 in Chicago and Detroit, 12 in St Louis, and 15 in Pittsburgh, but quite commonly five The term varies from two to six or seven years, but typically is three or four, and in nearly all instances members serve without pay

Board functions

Allowing for a board s somewhat weaker position where education is simply a branch of general municipal administration managerial responsibility for the city s entire public school system in any case rests mainly, if not completely, upon it It attends to the selection and purchase of land and buildings for school purposes, and passes upon plans and specifications and

lets contracts for the construction of buildings It provides the necessary fuel and other supplies, and janitor services It is responsible for the care of all school property It decides questions of educational policy, sometimes even of curriculum It estimates the sum needed for educational purposes each year, and either asks the city council for the amount, or, if its authority permits, raises it directly by a tax levy Finally, it appoints the school superintendent and has more or less to say concerning the appointment promotion, transfer, and pay of teachers Standing in relation to the board very much in the position of the manager in relation to the council in a council manager city, the superintendent is the responsible expert executive directly in charge of school affairs

Expansion of educational activities

The last 30 years have seen a remarkable expansion of educational and allied activities in American cities These now include—over and above the regular work of instruction through the familiar 12 year gradation—medical, dental, and psychopathic examination of school children operation of low priced or free lunch rooms, special classes for mentally retarded or physically defective children, evening classes for immigrants and illiterates, vocational guidance, including manual training, domestic science and commercial courses, sometimes provision of junior colleges or even of regular four year collegiate institutions, and numerous other services—perchance even including training in driving motor cars In hundreds of cities schoolhouses not only are used as polling places on election day, but are available for lectures and entertainments, with school yards sometimes enlarged and transformed into public playgrounds

## PUBLIC WORKS

Scope and organization

Where, as in the modern city, large numbers of people are massed within relatively small areas much is required not only to promote safety, but to provide a suitable physical environment in terms of public buildings, streets, sidewalks, bridges, lighting, sewers, waste disposal, transportation, recreational facilities, and the like, and most such conveniences fall under the general head of "public works" Providing and maintaining these is not government, at least in the older and narrower meaning of the term, but rather engineering, business, even commerce such as might be—indeed often has been—carried on by private persons or corporations But together they form the largest single segment of municipal administration with the most employees and (apart from schools) the heaviest expenditures *Departments of public works* may be broad enough to include such functions as water supply, production and distribution of electric power, maintenance of parks and playgrounds, and provision of airports, although in larger cities these commonly are assigned elsewhere In any case, they will almost certainly be extensive enough to require from three or four to seven or eight divisions or bureaus, such as engineering, public property, streets and sewers, refuse disposal, and sewage disposal Moreover, notwithstanding that many small cities with weak-mayor government still vest administration in a board, the nature of the work

clearly calls for a single-head department, and this is typically found, with a commissioner or director of public works appointed by the mayor or manager, preferably from among persons with engineering, or at least business, experience.

Some forms

1 Streets

Within the department's jurisdiction, when not assigned to a separate department of streets (as sometimes is done in large cities), fall the functions of planning the number, width, and direction of streets and avenues, making the necessary surveys, paving, widening, cleaning, repairing, sprinkling, and lighting streets, and laying sidewalks. Care must be taken to adapt the type of paving to a street's location and use, decisions must be reached on when to replace a street and when merely to repair it, applications of privately owned utilities to cut streets for the installation of pipes or wires must be considered, the most efficient yet economical apparatus for street cleaning and snow-removal must be adopted, and a large labor force must be managed. No one who goes about a progressive city today can fail to be impressed by the new types of street work machinery and other equipment introduced, or by the utility and attractiveness of most streets as compared with a generation ago. It has been estimated that almost one third of all land in an average city is occupied by streets.

2 Water supply

Another familiar form of public works is storing and distributing water—primarily an engineering activity, but one which in nearly one third of our cities has been municipalized because of its intimate relation to public health and fire protection. In many places, the water supply, in its natural condition, is so turbid or muddy, or so impure, or both, as to require special treatment before being used for domestic purposes. To eliminate turbidity, water often is stored in huge reservoirs where sedimentation is hastened by the introduction of alum. To sterilize water and thus destroy most of the harmful bacteria in it, liquid chlorine gas is in common use. And to remove, not merely kill, noxious bacteria, filtration plants have been introduced in many larger cities, with results usually reflected in a lowered death-rate from typhoid fever.

3 Waste collection and disposal

(a) Garbage

The collection and disposal of wastes is everywhere an important municipal activity, although the job is done a good deal more effectively in some cities than in others. Few people realize that, counting all kinds, a city's wastes exceed a ton a day per capita.

Municipal wastes take five principal forms, *i.e.*, ashes, inorganic rubbish, street sweepings, garbage, and sewage. Collection and disposal of the first three present only minor questions, and often are left to private individuals or concerns. Garbage and sewage, on the other hand, offer problems of great difficulty and importance. Garbage consists chiefly of the kitchen wastes from hotels, restaurants, and private dwellings, and hence materials in which putrefaction early sets in, and which soon become offensive, if not actually dangerous to health. Garbage collection is in most cities wholly a municipal undertaking, in others it is let out on contract, and occasionally householders are left to make their own arrangements, by contract or otherwise. In recent years, garbage reduction plants have come into favor in numerous cities, the oils and fats being extracted for commercial use in the form of soaps and

axle grease, leaving a residue salable as a fertilizer Incineration plants, however, are now even more common

(b) Sewage

Sewage consists primarily of water borne human effluvia from dwellings and wastes from many industrial plants such as laundries and slaughterhouses More than other forms of waste, this bears the germs of disease, and proper collection and disposal have urgent importance for the health of the community A prime municipal engineering activity is, therefore, the installation, operation, and maintenance of an adequate sewerage system (incidentally taking care of the run off of surface water) consisting of trunk lines, lateral branches, and connections for every building used as a dwelling or for commercial or industrial purposes In many cities, the problem is not solved with the construction of a sewerage system, the chief purpose of which is to collect sewage and carry it off, there remains the question of final disposal In cities on an ocean or a large lake or river, the matter may find ready, even if not ideal, solution Where, however, the same lake or river serves as the source of water supply for other communities, different methods of disposal have to be found, or the sewage must be subjected to chemical treatment before it is turned into the lake or stream in question

"Force account" or contract

In its department of public works, every city necessarily maintains a sizable labor force, known as its "force account", and ordinarily all work of a regular and continuous nature, e g, street cleaning and garbage collection, is performed by this force When, however, a large program of street construction is to be carried out, an important public building or bridge to be erected, a sewage treatment plant to be constructed, or some other unusual enterprise undertaken, the question must be faced of whether to employ only labor already on the city payroll or to seek bids from private builders and award a carefully guarded contract No single rule can govern decisions—except that each should be made in the light of all the factors involved It is not practicable, however, to maintain a continuous "force account" ample to take care of all unusual demands, particular types of specialized manpower and equipment, not ordinarily required, may be needed, and in practice the great majority of public works out of the regular routine are constructed on a contract basis

## PUBLIC UTILITIES

In addition to the many services thus far mentioned, there are others which the city dweller needs and under normal conditions cannot supply for himself He must have electricity, gas, telephone facilities, and street-car or bus transportation, and the only sources from which these can come are either private corporations authorized to provide them or utilities owned and operated by cities or other governmental units

Privately operated publicly regulated services

In all of the fields mentioned, by far the commonest source drawn upon is the private corporation, in 1948, only 13 1 per cent of cities of over 5,000 generated and distributed their own electricity, only 2 2 per cent provided their own gas, and only 2 per cent owned bus or trolley-bus systems Reliance on privately owned and operated utilities saves the city some tasks and prob-

lems but sometimes creates more than it saves Before a gas and electric company or a bus company can use the city streets, it must have a charter or franchise any extension of facilities must similarly have approval, rate schedules must be established and revised, often for different classes of customers, quality of service must be watched and controlled And although in the past 40 years, as utilities became linked up in systems transcending any one city, much regulation of the kind has passed to public utility, or public service commissions or other agencies of the states, some authority—in certain states a good deal—remains also in municipal hands, with responsibility devolving, however, more largely upon the council than upon administrative departments or divisions

Municipal ownership

Public ownership and operation is perhaps as controversial a matter as will be encountered in the entire field of municipal affairs Many people strongly favor it in principle many just as strongly oppose it, and arguments pro and con often are colored by practical interests involved Impeding its progress have been not only objections in principle but long term or even perpetual franchises held by private utility concerns, heavy expenses entailed in acquiring private plants and often doubt whether, at best, anything would be gained by displacing a private utility rendering satisfactory service Slowly advancing in the electric field the plan is almost at a standstill in relation to gas and transportation (except for recent large scale acquisitions of transit facilities by New York City and a municipal transit authority in Chicago), while telephone facilities largely tied up in great interstate systems, virtually nowhere have been municipalized Where utilities are municipally owned and operated, there may be a separate board commission, or manager for each as in Detroit Seattle, and Washington, or a single agency supervising all—perhaps in a utilities department—as in San Francisco and Los Angeles In New York and Wisconsin, the state public service commission has control over rates charged by municipally owned as well as privately-owned utilities in other states, such control extends only to services rendered beyond the city s limits, elsewhere there is no such control at all

## PLANNING AND ZONING

Planning

Most American cities grew spontaneously, entirely without plan, and, as a recent writer has observed, became whatever the railroads, port facilities a steel or rubber industry, or some other economic force made them The result has been incalculable confusion, inconvenience, and waste Good residential sections have been invaded by business and industry and their values destroyed, others because of social and economic changes that might have been foreseen, have become blighted districts, schools, churches, and libraries have turned out to be mislocated, narrow, winding streets are found where broad, straight thoroughfares ought to be, people have been allowed to congregate in slums, and slums to crowd hard upon "gold coasts' as in Chicago The lesson to be drawn is, of course, that a city, like any other complicated

structure, needs to be built, within practicable limits, according to plan—or, having been built otherwise, needs to be reconstructed (again within practicable limits) so as to undo some of the mistakes of the past and guard against their repetition in the future And this means not only that a city must somehow develop an over all plan suited to its size, location economy, and probable growth, but that all branches of its government and administration must work together to make the plan effective and keep it abreast of developing conditions Not until after the opening of the present century did these ideas take hold upon the American mind sufficiently to cause things to be done In 1907, however, Hartford, Connecticut, established a planning commission, other cities followed its example, and today scarcely an important municipality in the country lacks such an agency At first, the concept hardly extended beyond projecting splendid boulevards and imposing 'civic centers" But in time it expanded to comprehend the city as a whole, and nowadays it finds application to the most prosaic as well as the most spectacular aspects of the municipal pattern

Zoning

The principal tool of city planners is zoning, i e, the division of a city into districts or zones deemed most suitable on the basis either of existing conditions or of possible developments, for different uses, and fixing regulations for such uses (including height, size, and materials of buildings) in the interest of health, safety, convenience, morals, and general well being of the people, both of the immediate community and of the city at large Preparation of a zone plan for a sizable city is, of course, no simple matter and must be undertaken—normally by a city planning commission—only on the basis of intensive surveys and with the assistance of engineers and other technicians [3] And after the plan has been cast in the form of a zoning ordinance passed by the council, it will require not only a competent building inspector to enforce it, but a zoning board of appeals to hear and decide the inevitable protests by interested persons against the ordinance's operation in particular situations, and, within limits fixed by the ordinance, to authorize exceptions to be made From many points of view, zoning is a drastic procedure On the ground, however, that its sole purpose is promotion of the general welfare, the courts have sustained it as well within the undefined limits of the police power of the states and their localities

## MUNICIPAL FINANCES

At the heart of municipal administration is finance, for the activities enumerated (and others) can be carried on only by raising and spending generous sums of money New York City's 1949-50 budget of over $1 billion exceeded the year's budget for the state at large and was four times the combined budgets of all six New England states

Organization for fiscal management

Speaking broadly, financial control in a city involves preparing budgets, levying taxes, making assessments, collecting and handling funds, borrowing money, making appropriations, purchasing supplies, and accounting and auditing, and organization for these functions varies from city to city, with wholly satisfactory arrangements found in few In all cases, taxes are levied, money is borrowed, and appropriations are made by the council, representing the voters—although taxes often are levied also, quite independently, by the school board, by a park board, or by other authorities, and in both taxation and borrowing, state imposed restrictions have to be observed Remaining activities, being administrative, belong in other hands and ideally should be gathered in an integrated finance department, under a director responsible to the mayor or manager, and with bureaus substantially as follows (1) budgeting, under a budget director, (2) accounting, under a comptroller, (3) purchasing, under a purchasing agent, (4) assessing under an assessor, and (5) treasury management, under a treasurer In many cities, *e g*, Cleveland, such a balanced and articulated set-up exists and yields good results, and the general tendency is toward something like it Traditionally, however, offices like assessor, comptroller, and treasurer have been filled by popular election, and persistence of that method under older charters widely frustrates the mayor or manager in employing the finance department as an effective tool of executive management

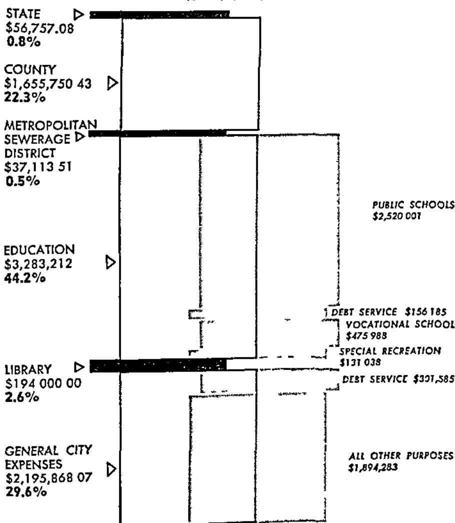
Expenditures—budgetary methods

Since World War II high cost of living has hit municipal as well as personal pocketbooks and expenditures have mounted accordingly People may complain of heavy city taxes, but they also go on demanding more and better municipal services, and taxpayer associations interested in lightening the tax burden find it difficult to suggest economies that will not cut into basic activities like police, fire protection, and public works—or that, if adopted at the expense of lesser services, such as recreation or libraries will have sufficient effect to change the picture significantly Under these conditions, municipal budget making becomes a challenging task In different cities, there are various sources from which the yearly budget may come In earlier times when the mayor almost uniformly was weak, budgets commonly were legislative rather than executive, that is to say, they were made—rarely very satisfactorily—by the council, and even today there are a good many cities *e g*, Chicago, in which the budget authority is a council committee Under commission government, too, the budget is prepared by the council, *i e*, the commission A major development of later years, however, has been (as also in state governments) in the direction of an executive type of budget, with estimates assembled under direction of the mayor or manager and put into form for council consideration by the budget director or comparable official where there is one, and this is a great improvement Ordinarily, the council can increase, decrease, insert, or strike out items but with power in the mayor, at least in strong mayor cities, to interpose a veto—in some instances even to veto particular items One defect of the manager system probably is that, although the budget invariably is of the executive type, there is no such check upon possible council extravagance, since the manager in no case, and

the mayor rarely, has any veto power At all events, the annual appropriation ordinance, embodying the proposed budget with or without changes, becomes the city's fiscal law for the ensuing year, and on the basis of it the council proceeds to make the necessary tax levy, with provision also, if required, for borrowing

Sources of revenue

Municipal revenue comes from sources falling into some half-dozen very unequal categories (1) At the top of the list, by a very wide margin, is taxes—primarily the general property tax levied annually by the council on



real estate and personal property at rates determined after assessed valuations and financial needs are known—and including in numerous cities taxes on public service corporations such as bus systems, gas and electric lighting companies, and telephone companies Frequently motor vehicle taxes are found, and parking meters are rapidly multiplying Many cities—as New York, Philadelphia, New Orleans, and more than 100 places in California—employ municipal sales taxes In some municipalities—especially in Pennsylvania and Ohio—personal, or both personal and corporate, income taxes are levied Poll taxes occasionally appear, as in Boston And here and there taxes on theater admissions, alcoholic beverages, real estate transfers, and various other things are encountered (2) Somewhat similar to taxes are special assessments levied against property owners to meet part or all of the cost of pavements gutters sidewalks, or water and sewer mains tending to improve property values in the neighborhood (3) License and permit fees are exacted from a multitude of enterprises and pursuits, including businesses, hotels, theaters mechanical amusements, newsdealers, and street venders (4) Often there will be income from water rates, in many cities, there is revenue from the sale of electricity to private consumers, in some from municipally owned street rail ways or buses, and in New York City and increasing numbers of other places from sewerage rentals Charges are made for other kinds of services also, as care and treatment in municipal hospitals, use of municipal golf courses and other recreational facilities, and sometimes refuse collection (5) Some cities are fortunate enough to have been provided with endowment or trust funds by private benefaction, and where they exist something, at least, will be derived from them (6) Finally, and more important than anything else except taxes are proceeds of state collected shared taxes and of grants in-aid, the latter bringing the city substantial sums not only from the state treasury but for certain purposes, *e g* airports, from the federal treasury as well

Of total general revenues of $5 376 billion in incorporated municipalities in 1950, 52 3 per cent came from the general property tax, 19 2 per cent from shared taxes and grants in aid, 12 7 per cent from service charges and miscellaneous, 8 5 per cent from sales and related taxes, and 5 7 per cent from license fees and permits Under pressure of growing needs, search for new sources that can be tapped without stirring too much public resentment goes on unceasingly in nearly every city

Borrowing

Total revenue from all regular sources is, as a rule, scarcely adequate to meet ordinary running expenses Consequently, when costly new enterprises are started, *e g* when a water system or a light plant is acquired, there usually has to be resort to loans, commonly in the form of either sinking fund or serial bond issues, and notwithstanding substantial reductions in many cities during World War II, the total municipal obligations of the kind stood in 1950 at $10 1 billion In authorizing new indebtedness, however, a city council usually operates under certain restraints In the first place, many charters or state laws require popular approval in a referendum before new bonds can be issued, and in the second place, in nearly all states a ceiling is fixed by the constitution or a statute The latter limitation, it is true, almost always is

flexible, being stated in terms, not of a fixed amount, but of some percentage—most often five, or at any rate not beyond 10—of the city's assessed valuation Moreover, the restriction ordinarily does not apply when new indebtedness is incurred for enterprises, *e g*, waterworks, expected eventually to pay for themselves Automatic constitutional or statutory debt limits, however, have shortcomings, and the future quite possibly lies with a different approach developed in North Carolina, where full supervision of municipal borrowing is vested in a state administrative agency authorized to handle each situation on its merits as it arises

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# CHAPTER 46

## Towns, Townships, Villages, and Districts

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Filling out the picture presented by counties and cities are thousands of minor jurisdictions in which people find government operating almost, as it were, on their doorsteps To be sure, in the South and Far West, the county is so dominant that, apart from cities, the only governmental subdivisions existing within it usually are mere administrative districts serving county purposes in connection with elections, highways, tax assessment and collection, justice, schools, and the like Almost everywhere else, however, are found units of more separate status and more general responsibility—in New England, the unincorporated and often largely rural "town", in the Middle and North Central states, the township, also unincorporated and usually rural, in most sections, lesser incorporated municipal units like villages, boroughs, and towns, and finally—also in nearly every part of the country—special (*i e* 'special purpose') districts, occasionally wholly rural, sometimes wholly urban, frequently partly both, and, although usually small, here and there large enough to include several counties Conforming to no single pattern of organization or function, all of these subordinate units have some measure of control over their own local affairs—reasonably broad in the case of towns, villages, and townships, usually limited to some single activity in that of special districts All nevertheless owe their existence, directly or indirectly, to the legislature and find their form, functions, and powers regulated in a good deal of detail by that body (either in a general code or by special act), if not indeed by the state constitution itself

### THE NEW ENGLAND TOWN

Legal status and functions

The New England town is not necessarily, nor even commonly, an urban center It may be such, and there are towns with populations running into the thousands But the majority of the 1,400 or more are rural communities (with or without a hamlet or village) covering from 20 to 40 square miles, and thus —though usually smaller and more irregular in shape—corresponding geographically to the townships found farther west Towns are not incorporated separately, and therefore do not have individual charters [1] Under broad legisla

[1] Likewise except occasionally in Maine Vermont and Connecticut thickly populated portions are not set off and incorporated as villages (and the like) as is usual in Midwestern townships

tive grants, however, they enjoy, as quasi corporations, almost all of the powers of full orbed municipal corporations they can own property, make contracts, sue and be sued, levy taxes, borrow money, and enact by laws or ordinances, and they may exercise controls (in so far as population warrants) relating to police, water supply, roads and streets, parks and public buildings fire protection, hospitals, libraries, and markets, and must provide school facilities and safeguard public health Not only, too, do they take care of purely local affairs, in addition, they act as agents of the state in assessing and collecting taxes, enforcing health regulations, and in other ways With slight exceptions, they also provide the units for representation in the state legislature for one house, or even both, and everywhere they constitute election districts for state and national purposes In every important respect, therefore, the New England town is the legal and administrative equivalent of a Midwestern city

*The town meeting*

The principal organ of government is a primary assembly composed of the town's qualified voters, and everywhere known as the town meeting, substantially all of the powers possessed are exercised by this body directly or through committees or officers acting as its agents The town meeting is convoked in the town hall once every year (in October in Connecticut, but elsewhere during the spring months), with special meetings called if needed, and for every meeting an itemized list of matters to be taken up is prepared and circulated by the "selectmen," with ordinarily no topic permitted to be considered unless it appears on the list Among items enumerated will certainly be appropriations for all of the town's supported activities (including schools), a tax rate designed to produce the necessary funds, and provisions for borrowing if any are required Among them, too, are likely to be proposed 'by laws' relating to public buildings, water supply, gas or electric lighting, highways, upkeep of cemeteries, and indeed anything else within the town's scope of authority, including, of course, local police Any voter present at a meeting is entitled not only to vote but also to speak, and while proceedings, as carried on under the guidance of an elected moderator, often are stereotyped and dull, issues provoking wide differences of opinion sometimes stir the liveliness of a political convention In smaller towns, where town meeting day takes on the aspect of a neighborhood holiday, there still is, as a rule, good attendance and plenty of action, even though an outsider might think some of the matters discussed ridiculously trivial In larger places, attendance is likely to be more scant and business more routine The town meeting is a notable American example of "pure" democracy and as such is a widely cherished part of our heritage

As towns grow in population, "direct democracy" is likely to be found ill-adapted to satisfactory handling of business, and one of two remedies may be adopted (1) a standing advisory budget committee of from 10 to 40 members may be set up to expedite the work of the general meeting, or (2) a 'limited town meeting" may be substituted, with all voters still privileged to attend, but only 200 or 300 representatives chosen in precincts entitled to vote Sooner or later, however, an overgrown town may take the logical course of giving up the town meeting idea altogether and applying for incorporation as a city or perchance a borough A good many larger towns have done this, although

usually there is reluctance to abandon the old usages, and many towns hold off until long after need for a change has become apparent [2]

Administrative agencies

At best, the town meeting is likely to be in session only one or two days a year, and for enforcing by-laws and carrying on the town's activities generally, the laws provide officials and boards—surprisingly numerous until it is remembered that, while operations must usually be on a decidedly small scale, practically all of the more familiar domestic functions of government as developed in our time have to receive attention even as in large places and on higher levels In small towns, purely minor officials are likely to be appointed by the selectmen, aside from this, however, officials and boards are chosen by the voters

Selectmen

No mayor or other chief executive exists [3] Instead, there is a board of selectmen—a group of three, five, or sometimes as many as nine, persons chosen to serve virtually as an executive committee of the town meeting and as such to act for the body during the long intervals between its sessions Usually the term is one year, but in many Massachusetts towns it is three years, and in any case reelections frequently assure fairly extended periods of service As an executive committee, the selectmen have authority only to enforce such orders of the town meeting and carry on such of the town's affairs generally as do not fall in the province of some different agency They do not make by laws, levy taxes, or appropriate money, only the town meeting can do those things Nor do they wield any centralized control over other town officials Within their limits, however, they are found granting licenses, laying out highways, caring for town property, awarding contracts, arranging for town meetings and elections, and in towns where there are no separate boards for such purposes, acting as overseers of the poor and as the town board of health

Other Officers

Second in importance to the selectmen is the town clerk, elected annually, but often continued in office year after year until he becomes the acknowledged authority on town history, precedents, and genealogy He keeps the records of town meetings, issues marriage licenses, gathers and records vital statistics and, in Vermont, Rhode Island, and Connecticut records deeds mortgages and other legal documents There is always a town treasurer, sometimes an auditor, and invariably at least one constable to arrest violators of the law, serve court processes, and act as tax collector There is also an elected school committee, or board, which in most New England states has direct control over the town schools, usually, too, in larger towns there is a board of health and a board of overseers of the poor Finally, there are miscellaneous minor officials in some places appointed mainly by the selectmen, and in any case having only more or less nominal duties (with frequently no pay)—for example, justices of the peace, considered state officers but often elected in the town, road

[2] The largest New England town [illegible]

surveyors, charged with keeping public roads and bridges in repair, sealers of weights and measures, who test the accuracy of scales and of measuring implements and utensils; library trustees, almshouse custodians, and park commissioners

## TOWNSHIPS

From a reading of the laws, one might deduce that the township meeting required by statute in half of the "township states" (confined to the northernmost tier across the central portions of the country) would look and act very much like the New England town meeting on which it is modeled All qualified voters are entitled to participate, the body has an annual spring meeting in the town hall, with special meetings as required, an elected moderator presides, and functions include electing township officers, levying taxes, making appropriations, and enacting by-laws Almost everywhere, however, the township meeting, if kept up at all, is only a pale image of the usually well attended and reasonably vigorous New England gathering Interest is lax and attendance scant, often not enough persons are present to prevent the officers from completely dominating the perfunctory proceedings In New York, experience has been so unhappy that the meeting has been abolished And altogether, as a recent writer has observed, "the spirit of town-meeting government has failed to take root in most townships in which the meeting system has been established by law"

The township meeting

Whatever the township meeting may amount to in states employing it, every township state provides by law for a governing board in each township, variously termed board of supervisors or trustees, advisory board, or board of auditors, but, whatever called, usually consisting of three members, all elective in 10 states, all *ex officio* elsewhere Functions, both of the board as such and of individual members, vary widely But naturally they are more important where there is no township meeting, for in that situation the board may become the nearest approach to a general governing authority, with usually the elective, financial, and regulatory powers that the meeting would exercise if there were one In any case, the board frequently is charged with responsibility for any township affairs not expressly assigned to some other agency

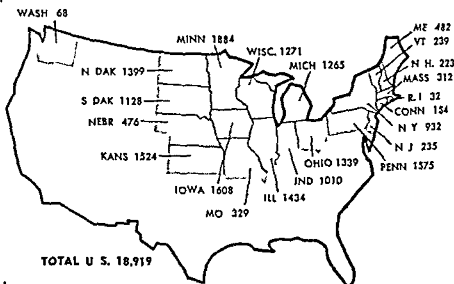
The township board

In about half of the township states (whether with or without town meetings), management of affairs, however, centers rather in a single elective officer known in New York, Michigan, and Illinois as supervisor, in Indiana, Kansas, and Missouri as trustee, and in Wisconsin as town chairman, where such an officer exists, the function of the township boards becomes mainly that of advising and checking him In Indiana, where this chief officer's functions attain their peak, the trustee serves the township—not only in its general civil capacity but as a school township as well—as *ex officio* clerk and treasurer, with responsibility for the care of property, the administration of poor relief, the preparation of civil and school budgets, and even the selection of teachers for rural schools, although not for taxing, appropriating, or borrowing, which remain functions of the township board In other states, duties are much the same except usually do not include school affairs

The supervisor or trustee

Other officers

Where the chief township officer does not serve as *ex officio* clerk and treasurer, there are likely to be separate officers bearing those names, and where tax assessment and collection have not been transferred to the county, an assessor also and perhaps a separate collector An overseer of the poor and




a highway commissioner will likely exist in addition, unless the duties are otherwise provided for, and almost invariably there will be two or more elective justices of the peace, with an equal number of elective constables charged with tasks, within the smaller area, similar to those of the county sheriff

## VILLAGES, BOROUGHS, TOWNS

Status

When a local area under rural government takes on a semi-urban aspect, its inhabitants are likely to demand new public services, such as fire protection, street paving and lighting, water supply, and sewerage facilities, and sooner or later, in most parts of the country, the legislature is likely, by special charter or under general statute, to give such communities a sort of second class municipal status as 'villages" (in the Midwest and Northwest), 'boroughs" (in Connecticut, New Jersey, Pennsylvania, and other Eastern states), or 'towns' (in the South and West) [4] State law often requires that a community seeking incorporation as a village shall have a certain minimum and/or

[4] To be distinguished sharply from the non municipal New England town For simplicity present comment will be in terms of villages only

maximum population and area, and that the question of incorporation be submitted to a popular referendum In Illinois, for example, any area of not more than two square miles, with at least 100 inhabitants, if not already within a village or city, may become a village by a vote of the people at a special election It then remains a village until it has 1,000 inhabitants, when it may (but is not obliged to) change to a city government [5] Incorporation gives a village power to undertake practically any municipal services, to levy taxes and borrow money to support them, and to have its own government distinct from the governments of township and county Several thousand such incorporated places exist in the United States, they are found in all parts of the country—although by far the greater number are in the North Central section

Government

Although far from uniform, the government of such units is comparatively simple. In some states, e g, New York, there is no meeting, and control of practically all matters is left to certain elected officials In such cases, the main governing authority is likely to be a village board of from three to nine unpaid members, called by various names e g, trustees (New York), assessors (Maine), commissioners (New Hampshire), burgesses (Connecticut), or the village council Other village officers include a mayor or president or chief burgess as chief executive, usually the "weak-mayor' type, but sometimes with a veto upon the acts of the village board, also a clerk, a treasurer, a marshal or police officer, and a police magistrate with functions similar to those of a justice of the peace [6] Thus, in structure and functions, the government of villages bears resemblance to that of cities except, of course, that usually it is on a decidedly smaller scale Indeed, it almost may be said that villages are miniature cities, at all events, they often mark transitional stages in the development of cities out of what were originally rural communities

## SPECIAL DISTRICTS

Nature

No description of local government in the United States today approaches completeness unless mention is made of another type of unit introduced in all parts of the country to serve purposes for which older units have been found inadequate or are inherently inappropriate This is the special, or special-purpose, district, established as a quasi municipal corporation for the performance usually of a single governmental function, or at most of a few closely related ones Sometimes such districts lie wholly within the boundaries of a city, a town, or even a village, and generally they are entirely within a county Nevertheless, their boundaries seldom coincide with those of any older political subdivision In the majority of instances, they are unions of two or more townships, villages, or small cities, or they comprise territory lying within more than one such unit In any case, and despite the fact that they may contain practically the same inhabitants, they are legally quite independent of

[5] Oak Park, a suburb of Chicago with 63,175 inhabitants (1950), still holds to the village form of government

[6] In New York, a general village law of 1927 provides a model charter for all incorporated villages about 450 in number Under it the chief executive now called mayor and the village trustees are the only elective officers The Minnesota legislature of 1949 authorized three optional plans of village government including a council manager form

county, township, village, or city authorities in dealing with matters falling within their jurisdiction

Types

With what diversity such districts have developed in recent decades is indicated by the fact that a few years ago they existed under 89 different names, representing 47 distinct varieties, counting all forms of school districts only once For present purposes, it will suffice to touch upon five main types (1) school districts, (2) public utilities districts, (3) sanitary districts, (4) water control and soil conservation districts, and (5) miscellaneous

1 School districts

Oldest, most numerous, and best known are school districts, found in nearly every state, and the principal unit of local educational administration in 26[7] In 1944, a total of 108,579 such districts were reported for the country as a whole (as of 1942), and despite consolidations since occurring in various states, there still are at least 90,000—some urban or semi urban, but the great majority rural, and often with only a single-teacher elementary school Originating in early desire for a school within walking distance for the children of a community, the system has been perpetuated by local sentiment and tradition by its assumed relative inexpensiveness, and to a degree by the hope of protecting the schools against politics by keeping them independent of units of general government Several different species of school districts, under a variety of names, have been discovered and catalogued But, whatever called, all exist for a common purpose to provide the necessary land, buildings, and teachers and to levy and appropriate the necessary taxes, for the maintenance of elementary, if not also of intermediate and perchance high, schools

2 Public utilities districts

Public utilities districts have been created in considerable variety for the sole, or chief, purpose of constructing, owning and operating works necessary to provide the local inhabitants with water, gas, electricity, or transportation The Metropolitan Water District of Massachusetts, serving residents of Boston and vicinity, is one of the most imposing instances of the kind

3 Sanitary districts

Sanitary districts, under various names, have for their main object the improvement and protection of public health by providing for the establishment of boards of health and the creation and maintenance of drainage and sewerage systems The best known example is the Sanitary District of Chicago established in 1889, and comprising, in addition to the entire urban territory, 195 square miles outside of the city, and 97 per cent of the population of Cook county Trustees of this district have constructed and now operate, over 60 miles of canals connecting the Chicago and Illinois Rivers, together with the necessary engineering works for reversing the current of the Chicago River and diverting Chicago sewage (after passing through treatment plants) from Lake Michigan into the Illinois and Mississippi Rivers

4 Water control districts

Water control districts have to do primarily with impounding or distributing water supplies, diverting water courses, draining swamps, or protecting given areas against floods or tidal waves Among notable examples are the Metropolitan Water District of Southern California, which includes 14 cities,

[7] In other states the principal such unit is the town (e g Maine Massachusetts and Rhode Island) the township (e g Indiana) or the county (e g 12 Southern states) Various states employing the township or county system however also have some school districts

and the Miami Conservancy District in Ohio, created in 1913 after the Dayton flood, and covering nine counties Perhaps the commonest illustrations are the *irrigation, drainage*, or reclamation districts found in numerous states, with nearly 300 reclamation and irrigation districts in California alone, and almost 500 drainage districts in Illinois Here also are to be included a country-wide network of over 2,200 soil conservation districts—as of March 1, 1950, covering an area of more than 1 2 billion acres and embracing about four fifths of the nation's farms

5 Miscellaneous districts

In the miscellaneous class, one finds a truly heterogeneous array road, paving, and bridge districts in a dozen states, forest fire districts in New England, New York, and California, forest preserve districts,[8] flood prevention districts, tuberculosis sanitarium districts, mosquito abatement districts, local improvement districts or associations, housing districts, and a large assortment of park districts

*Governing authorities*

*In origin and purpose, special districts, the country over, show an almost* boundless diversity All, however, are endowed with some of the attributes of a municipal corporation, including the right to acquire, hold and dispose of property, to sue and be sued, to have a corporate seal, to adopt regulations called by laws, and, most important of all, to levy taxes spend money, and *take such other steps as may be authorized by law for attaining the objectives* for which the district was created Nearly all, furthermore, exercise their powers through a small governing body of commissioners, directors, or trustees, either elected by popular vote, or, less frequently, appointed by some state or county authority, and almost invariably such officials serve for short terms and without pay *In the domain of school affairs*, some states provide for an annual "school meeting" in each district, composed of all voters who choose to attend Whether or not, however, there is such a meeting, every district has a small school board (usually elective, but in urban districts often appointed), and to this authority it falls not only to acquire and care for school property, hire teachers, purchase supplies, and to some extent regulate curricula, but, where there is no school meeting, also to levy the school tax, authorize expenditures, and determine general policy There usually are also a chairman, a secretary or clerk, a treasurer, and in larger places a school superintendent, all selected in some states by the board itself, in others by the voters in school meeting or otherwise

*Some disadvantages*

No one would deny that the special district is an exceedingly useful, and *for some purposes an almost indispensable*, local government device Where some particular governmental function needs to be performed in an area not coinciding with any existing geographical unit—perhaps only part of a county or city, perhaps several contiguous counties or portions thereof—it permits such an area to be laid out independently, given corporate identity, and endowed with the requisite organization and powers On the other hand, the multiplication of such districts has had unfortunate results (1) in many states,

[8] Perhaps the most important district of this type is that of Cook County Illinois created in 1915 to provide for the metropolitan district of *Chicago an elaborate system of outer parks* and connecting boulevards More than 25 000 acres have been acquired and permanently set apart for recreational purposes

it has made an already complicated system of local government still more complex and bewildering, (2) it has burdened the voters in those states particularly, but everywhere in some degree, with an excessively long ballot, (3) many times a special district becomes only a subterfuge for evading restrictions on spending or borrowing,[9] and everywhere it helps push the cost of local government upward, (4) here and there it has resulted in wasteful duplication of services, and in tax levies for the same or similar purposes by different authorities, and (5) it inevitably divides administrative responsibility

## RECONSTRUCTION OF LOCAL GOVERNMENT

Local government in most parts of the United States is too complicated, too diffused, too costly, and too wasteful From a minimum of three or four, the different 'layers' of authority under which the citizen lives often mount to as high as eight or ten—all of them local (county, township, village, district, and the like) except the state and national, and even where the situation is not at its worst, he well may be pardoned for having no clear comprehension of the maze of overlapping jurisdictions enveloping him and only a rather passive interest in what he cannot understand He often may be forgiven, moreover, for feeling that, while the levies of the federal government perhaps burden him most, he also is paying for too much government nearer home Three or four modes of betterment suggest themselves, and in places here and there are being tried

1 Elimination of petty units

The first and most obvious is elimination of small or relatively useless units by consolidation with or into larger ones At the top, this should start with counties, and we have seen that county consolidation could usefully reduce the existing 3,050 by at least a third, even though obstacles are so great that as yet only two county consolidations actually have taken place The next candidate for contraction is the township, and here the record is a little better Practically all authorities agree that, under modern conditions of travel and communication the township, where and as it exists, is an outworn institution which well might be dispensed with In several states, upwards of a fourth of all townships contain fewer than 400 people living outside any village or city, and in any event the area is bound to be very small—commonly only 36 square miles Besides, it should be remembered that in more than half of the states the township as a unit of government has never existed at all Principal township activities usually relate to law enforcement, poor relief, and highway maintenance But all of these are at the same time functions of the county, with separate township activities merely costly and wasteful Ordinarily, much would be gained, in both economy and efficiency, if the township were simply eliminated, with everything left to the county, or in some cases to county and city And here some progress is being made Under a statute giving county

boards the necessary power, some 90 townships in northern Minnesota have been dissolved since 1933, all those of Oklahoma (about 900) were, for all practical purposes, abolished in the same year by withdrawal of their power to tax, followed by transfer of their tax-supported functions to counties, in 1946, two Missouri counties voted to join the large majority in the state not having township government, while in Maine a number of little towns (comparable to townships) have voluntarily "deorganized" themselves, i e, given up their corporate organization as being too expensive to maintain [10]

The most numerous small units are, of course, school districts But nearly half of the states have long done sufficiently well with few if any of the familiar one teacher, community-type districts, and many of those still having them are finding them less useful than in earlier days The alternative, ordinarily, is a large district into which neighboring small ones are merged, and consolidations of this nature already have reduced the number in the country by upwards of 20,000—including some 6,000 absorbed in Illinois, 3,000 in Kansas, and over 1,000 each in New York, Arkansas, Oklahoma, and Texas A powerful weapon in overcoming local reluctance is financial pressure from the state capital, illustrated by the withholding in Illinois of state aid from all meagerly-attended schools refusing to close or consolidate

2 Transfers of functions

Where small units of government are eliminated, functions commonly pass to some larger unit above, as from the township ordinarily to the county Another mode of improving conditions is however, to transfer functions, even though the units themselves remain, and a chief field in which this has been taking place is highway construction and maintenance, with shifts from township to county and also from county to state Townships commonly find it highly burdensome to provide themselves with the equipment and engineering personnel required by modern methods of road work, and to keep them employed, so, indeed, do many counties Consequently, in several states, e g, Michigan and Indiana, township highway functions have been transferred outright to the county, while in others, e g, Delaware, West Virginia, and North Carolina, the next logical step has been taken also, with such functions transferred from the county to the state—and with results on both levels invariably reported as beneficial, financially and otherwise Although with less as yet accomplished, public health is another function inviting such readjustments, at least in so far as the township is concerned A different form of transfer occurs when two or more local governments—counties, townships, or municipalities—enter into a cooperative arrangement under which specified functions are performed for them by some joint agency—with or without a special district set up for the purpose Sanitation, health, fire protection, water supply, airports, and library service are among functions which, with increasing frequency, are being turned over by individual governmental units to joint agencies, with such integration broadly authorized by statute in Minnesota, Louisiana, and other states, and, significantly, by the recent constitutions of Missouri and Georgia

... than the county,
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3 Internal reorganization

Finally, taking local-government areas and functions as they are, need almost everywhere exists for improvement in internal organization and operations This, however, should be obvious from preceding pages and will not be elaborated here, save to remind ourselves of (1) the urgent need in counties for consolidation of offices and grouping of those that remain in integrated departments, and particularly for a single and strong chief executive, (2) the desirability of further adoptions of strong mayor and manager forms of government in cities, (3) in townships (in so far as they are to survive), the gains to arise from abandonment of the township meeting where it does not function usefully, from more general provision for a coordinating administrative officer, and from elimination of township justices of the peace in favor of salaried trial justices with county-wide jurisdiction, (4) the advantages to be derived from a progressive replacement of popular election of minor officers on all local levels by appointment by appropriate authorities, state, county, or other, and (5) the formidable task that remains if the stranglehold of the spoils system upon local government as a whole is ever to be broken [11]

The outlook

It is not to be expected that reconstruction of local government on any of the lines suggested will proceed rapidly Inertia, vested interests, local pride, and many other things stand in the way—among them the still prevalent notion that democracy requires home" government to be kept very close to the people locally and most local officers to be chosen directly by the communities which they serve Judging by recent trends, one may surmise that city county consolidation, school district consolidation, voluntary "administrative unions' (with or without special districts employed), transfer of functions from smaller to larger units, and the city managership, will advance fastest, abolition of townships, merging of special districts with regular units of government and reorganization of county governments a good deal more slowly, and consolidation of counties and adoption of merit systems most slowly of all In any event over-all progress will be attained in proportion as the hard lesson is learned that true democracy on the home front consists not in a multiplicity of petty community governments and elective officers, but in governments adjusted to the changed patterns of social and economic life in our day and operated by officials fewer in number, but no less sensible of their responsibility to the people because of being more generally selected for their tasks by discriminating executives and administrators

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w York

XV

[11] New York is the only state requiring adherence to merit principles by all units of government About 1 000 municipalities throughout the country are wholly or partly on a merit basis also somewhat over 250 counties But in the great majority of counties and in practically all townships and districts personal and partisan appointments and removals are unrestrained by any law

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# The Constitution of the United States of America

We the people of the United States in order to form a more perfect union establish justice insure domestic tranquillity provide for the common defense promote the general welfare and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America

## ARTICLE I

### SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives

### SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature

No person shall be a Representative who shall not have attained to the age of twenty five years and been seven years a citizen of the United States and who shall not when elected be an inhabitant of that State in which he shall be chosen

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers

authority thereof shall issue writs of election to fill such vacancies

The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment.

### SECTION III

The Senate of the United States shall be composed of two Senators from each State chosen by the legislature thereof[4] for six years and each Senator shall have one vote

1 Altered by the Fourteenth Amendment
2 Rescinded by the Fourteenth Amendment.
3 Temporary provision
4 Modified by the Seventeenth Amendment.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year;

years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice President, or when he shall exercise the office of the President of the United States

The Senate shall have the sole power to try all impeachments When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two thirds of the members present

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV

The times places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day [6]

SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting

[5] Modified by the Seventeenth Amendment
[6] Superseded by the Twentieth Amendment

SECTION VI

The Senators and Representatives shall receive a compensation for their services to be ascertained by law and paid out of the Treasury of the United States They shall in all cases except treason felony and breach of the peace be privileged from arrest during their attendance at the session of their respective houses and in going to and returning from the same and for any speech or debate in either house they shall not be questioned in any other place

No Senator or Representative shall during the time for which he was elected be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time and no person holding any office under the United States shall be a member of either house during his continuance in office

SECTION VII

All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills

Every bill which shall have passed the House of Representatives and the Senate shall before it become a law be presented to the President of the United States if he approves he shall sign it but if not he shall return it with his objections to that house in which it shall have originated who shall enter the objections at large on their journal and proceed to reconsider it If after such reconsideration two thirds of that house shall agree to pass the bill it shall be sent together with the objections to the other house by which it shall likewise be reconsidered and if approved by two thirds of that house it shall become a law But in all such cases the votes of both houses shall be determined by yeas and nays and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him the same shall be a law in like manner as if he had signed it unless the Congress by their adjournment prevent its return in which case it shall not be a law

Every order resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States and before the same shall take effect shall be approved by him or being disapproved by him shall be repassed by two thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill

SECTION VIII

The Congress shall have power to lay and collect taxes duties imposts and excises to pay the debts and provide for the common defense and general welfare of the United States but all duties imposts and excises shall be uniform throughout the United States

To borrow money on the credit of the United States

To regulate commerce with foreign nations and among the several States and with the Indian tribes

To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States

To coin money regulate the value thereof and of foreign coin and fix the standard of weights and measures

To provide for the punishment of counterfeiting the securities and current coin of the United States

To establish post-offices and post roads,

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,

To constitute tribunals inferior to the Supreme Court,

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations,

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water,

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years,

To provide and maintain a navy,

To make rules for the government and regulation of the land and naval forces,

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions,

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress,

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof

SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person[7]

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it

No bill of attainder or *ex post facto* law shall be passed

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken

No tax or duty shall be laid on articles exported from any State

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another

No money shall be drawn from the Treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time

No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State

[7] Temporary provision

SECTION X

No State shall enter into any treaty, alliance, or confederation grant letters of marque and reprisal, coin money emit bills of credit make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress

No State shall, without the consent of Congress, lay any duty of tonnage keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay

## ARTICLE II

SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years and together with the Vice-President, chosen for the same term, be elected as follows

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress, but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with

8 Superseded by the Twelfth Amendment.

time of the adoption of this Constitution shall be eligible to the office of President neither shall any person be eligible to that office who shall not have attained to the age of thirty five years and been fourteen years a resident within the United States

In case of the removal of the President from office or of his death resignation or inability to discharge the powers and duties of the said office the same shall devolve on the Vice President and the Congress may by law provide for the case of removal death resignation or inability both of the President and Vice President declaring what officer shall then act as President and such officer shall act accordingly until the disability be removed or a President shall be elected

The President shall at stated times receive for his services a compensation which shall neither be increased nor diminished during the period for which he may have been elected and he shall not receive within that period any other emolument from the United States or any of them

Before he enter on the execution of his office he shall take the following oath or affirmation

I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States and will to the best of my ability preserve protect and defend the Constitution of the United States"

#### SECTION II

The President shall be commander in-chief of the army and navy of the United States and of the militia of the several States when called into the actual service of the United States he may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment

He shall have power by and with the advice and consent of the Senate to make treaties provided two thirds of the Senators present concur and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors other public ministers and consuls judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone in the courts of law or in the heads of departments

The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session

#### SECTION III

He shall from time to time give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient he may on extraordinary occasions convene both houses or either of them and in case of disagreement between them with respect to the time of adjournment he may adjourn them to such time as he shall think proper he shall receive ambassadors and other public ministers he shall take care that the laws be faithfully executed and shall commission all the officers of the United States

#### SECTION IV

The President Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason bribery or other high crimes and misdemeanors

## ARTICLE III

### SECTION I

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish The judges both of the supreme and inferior courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office

### SECTION II

The judicial power shall extend to all cases in law and equity arising under this Constitution the laws of the United States and the treaties made or which shall be made under their authority —to all cases affecting ambassadors other public ministers and consuls —to all cases of admiralty and maritime jurisdiction —to controversies to which the United States shall be a party —to controversies between two or more States —between a State and citizens of another State [9]—between citizens of different States —between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States citizens or subjects [9]

In all cases affecting ambassadors other public ministers and consuls and those in which a State shall be a party the Supreme Court shall have original jurisdiction In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regula tions as the Congress shall make

The trial of all crimes except in cases of impeachment shall be by jury and such trial shall be held in the State where the said crimes shall have been committed but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed

### SECTION III

Treason against the United States shall consist only in levying war against them or in adhering to their enemies giving them aid and comfort No person shall be con victed of treason unless on the testimony of two witnesses to the same overt act or on confession in open court

The Congress shall have power to declare the punishment of treason but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted

## ARTICLE IV

### SECTION I

Full faith and credit shall be given in each State to the public acts records and judicial proceedings of every other State And the Congress may by general laws prescribe the manner in which such acts records and proceedings shall be proved, and the effect thereof

### SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States [10]

[9] Restricted by the Eleventh Amendment.
[10] Made more explicit by the Fourteenth Amendment.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime

No person held to service or labor in one State under the laws thereof, escaping into another shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due [11]

SECTION III

New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence

## ARTICLE V

The Congress whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three fourths of the several States or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article,[12] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate

## ARTICLE VI

*All debts contracted and engagements entered into before the adoption of this* Constitution shall be as valid against the United States under this Constitution as under the confederation [13]

This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding

The Senators and Representatives before mentioned, and the members of the

[11] Superseded by the Thirteenth Amendment in so far as pertaining to slaves.
[12] Temporary clause
[13] Extended by the Fourteenth Amendment

several State legislatures and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States

## ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same

Done in convention by the unanimous consent of the States present the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty seven and of the independence of the United States of America the twelfth In witness whereof, we have hereunto subscribed our names
[Signed by] [14]

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ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES [OR CONVENTIONS THEREIN] PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

Article I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances

Article II A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed

Article III No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law

Article IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized.

Article V No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation

Article VI In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[14] The signatures are omitted here

Article VII In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re examined in any court of the United States than according to the rules of the common law

Article VIII Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted

Article IX The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

Article X [15] The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people

Article XI [16] The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State

Article XII [17] The electors shall meet in their respective States and vote by ballot for President and Vice President one of whom at least shall not be an inhabitant of the same State with themselves they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice President and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President and of the number of votes for each which lists they shall sign and certify and transmit sealed to the seat of the government of the United States directed to the President of the Senate The President of the Senate shall in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of electors appointed and if no person have such majority then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President But in choosing the President the votes shall be taken by States the representation from each State having one vote a quorum for this purpose shall consist of a member or members from two thirds of the States and a majority of all States shall be necessary to a choice And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March [18] next following then the Vice President shall act as President as in the case of the death or other constitutional disability of the President

The person having the greatest number of votes as Vice President shall be the Vice President if such number be a majority of the whole number of electors appointed and if no person have a majority then from the two highest numbers on the list the Senate shall choose the Vice President a quorum for the purpose shall consist of two thirds of the whole number of Senators and a majority of the whole number shall be necessary to a choice But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States

Article XIII [19] *Section 1* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction

*Section* 2 Congress shall have power to enforce this article by appropriate legislation.

**Article XIV**[20] *Section* 1 All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

*Section* 2 Representatives shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State, excluding Indians not taxed But when the right to vote at any election for the choice of electors for President and Vice President of the United States Representatives in Congress the executive and judicial officers of a State or the members of the legislature thereof is denied to any of the male inhabitants of such State being twenty one years of age and citizens of the United States or in any way abridged except for participation in rebellion, or other crime the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty one years of age in such State

*Section* 3 No person shall be a Senator or Representative in Congress, or elector of President and Vice President or hold any office civil or military under the United States or under any State who having previously taken an oath as a member of Congress or as an officer of the United States or as a member of any State legislature or as an executive or judicial officer of any State to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof But Congress may by a vote of two thirds of each house, remove such disability

*Section* 4 The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave but all such debts obligations and claims shall be held illegal and void

*Section* 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

**Article XV**[21] *Section* 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race color or previous condition of servitude

*Section* 2 The Congress shall have power to enforce this article by appropriate legislation

**Article XVI**[22] The Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration.

**Article XVII**[23] The Senate of the United States shall be composed of two Senators from each State elected by the people thereof, for six years and each Senator shall have one vote The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

[20] Proclaimed July 28 1868
[21] Proclaimed March 30 1870
[22] Proclaimed February 25 1913
[23] Proclaimed May 31, 1913

When vacancies happen in the representation of any State in the Senate the executive authority of such State shall issue writs of election to fill such vacancies *Provided* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution

[illegible]

hibited

*Section* 2 The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation

*Section* 3 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress[25]

Article XIX[26] *Section* 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex

*Section* 2 Congress shall have power to enforce this article by appropriate legislation

Article XX[27] *Section* 1 The terms of the President and Vice President shall end at noon on the 20th day of January and the terms of Senators and Representatives at noon on the 3rd day of January of the years in which such terms would have ended if this article had not been ratified and the terms of their successors shall then begin

*Section* 2 The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January unless they shall by law appoint a different day

*Section* 3 If at the time fixed for the beginning of the term of the President the President elect shall have died the Vice President elect shall become President If a President shall not have been chosen before the time fixed for the beginning of his term or if the President elect shall have failed to qualify then the Vice President elect shall act as President until a President shall have qualified and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President elect shall have qualified declaring who shall then act as President or the manner in which one who is to act shall be selected and such person shall act accordingly until a President or Vice President shall have qualified

*Section* 4 The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them

*Section* 5 Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article

[24] Proclaimed January 29 1919
[25] Rescinded by the Twenty first Amendment.
[26] Proclaimed August 26, 1920
[27] Proclaimed February 6 1933

*Section 6* *This article shall be inoperative unless it shall have been ratified as an* amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission.

**Article XXI.**[28] *Section 1* The Eighteenth article of amendment to the Constitution of the United States is hereby repealed.

*Section 2* The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

*Section 3* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**Article XXII**[29] *Section 1* No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

*Section 2* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission to the States by the Congress.

## REFERENCES

Department of State, *Documentary History of the Constitution of the United States of America, 1786-1870* (3 vols., Washington, D. C., 1894-1900).

*The Constitution of the United States of America Annotated to January 1, 1938.* 74th Cong., 2nd Sess., Sen. Doc. No. 232. A new edition of this *official* text, carrying amendments to January 1, 1950, is in preparation.

[28] Proclaimed December 5, 1933.
[29] Proclaimed March 3, 1951.

## AMENDMENT AT PRESENT BEFORE THE STATES FOR ADOPTION

### *Child Labor*

*Section* 1 The Congress shall have power to limit regulate and prohibit the labor of persons under eighteen years of age

*Section* 2 The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress [1]

[1] Proposed to the legislatures of the several states June 2, 1924

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